No. 90-925-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Joseph Patrick Doherty

Docketed:
December 11, 1990

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Pike,Mary Boresz, Helton,Arthur C.

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Entry	Date	Note	Proceedings and Orders
1	Dec 11 1990	G	Petition for writ of certiorari filed.
2	Dec 11 1990		Appendix of petitioner filed.
4	Jan 4 1991		Order extending time to file response to petition until January 29, 1991.
5	Jan 25 1991		Brief of respondent Doherty in opposition filed.
6	Jan 30 1991		DISTRIBUTED. February 15, 1991
7	Feb 6 1991	X	Reply brief of petitioner INS filed.
8	Feb 19 1991		Petition GRANTED.
			**********
10	Mar 29 1991		Order extending time to file brief of petitioner on the merits until April 19, 1991.
12	Apr 19 1991		Brief of petitioner INS filed.
13	May 1 1991		Joint appendix filed.
15	May 10 1991		Order extending time to file brief of respondent on the merits until June 5, 1991.
16	Jun 5 1991		Brief amicus curiae of United Nations High Commissioner for Refugees filed.
17	Jun 5 1991		Brief amici curiae of Members of the US Senate and House of Representatives filed.
18	Jun 5 1991		Brief amicus curiae of International Human Rights Law Group filed.
19	Jun 5 1991		Brief of respondent Joseph Doherty filed.
21	Jun 5 1991		Brief amici curiae of ACLU, et al. filed.
20	Jun 6 1991		Brief amici curiae of Amnesty International, et al. filed.
22	Jul 8 1991		Reply brief of petitioner INS filed.
23	Jul 12 1991		CIRCULATED.
24	Jul 19 1991		SET FOR ARGUMENT WEDNESDAY, OCTOBER 16, 1991. (4TH CASE)
25	Jul 25 1991		Certified copy of original record and proceedings,in one box, received.
26	Sep 27 1991		Letter from the Solicitor General received and distributed.
27	Oct 11 1991		Report received from Counsel for the respondent and circulated.
28	Oct 16 1991		ARGUED.

90-925

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Attorney General is prohibited from considering the United States' measures to combat terrorism, and other foreign policy concerns, when he exercises his discretion to grant or deny asylum to an alien under 8 U.S.C. 1158(a).

2. Whether the Attorney General properly declined to reopen respondent's deportation proceedings to allow him to apply for withholding of deportation to the United Kingdom, on the ground that the existing record established that he would be ineligible for that relief under statutory exceptions because he committed serious crimes in the United Kingdom and was actively involved in the Provisional Irish Republican Army, a terrorist organization.

3. Whether the Attorney General abused his discretion in deciding that reopening of respondent's deportation proceedings to allow him to apply for asylum and withholding of deportation was not warranted by, *inter alia,* the Attorney General's final decision in the deportation proceedings themselves (which rejected respondent's position on a disputed issue) or a change in foreign law.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. -

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice, Immigration and Naturalization Service (INS), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-45a)[1] is reported at 908 F.2d 1108. The opinions and orders of the Attorney General (App. 46a-91a, 116a-130a), the Board of Immigration Appeals (App. 92a-115a, 131a-133a, 134a-147a, 148a-155a), and the immigration judge (App. 156a-159a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1990. App. 160a. A timely petition for rehearing was denied on September 13, 1990. App. 161a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, and implementing regulations are set forth at App. 162a-166a.

STATEMENT

1. Respondent is a native of Northern Ireland, a citizen of the United Kingdom, and a member of the terrorist organization known as the Provisional Irish Republican Army (PIRA). Before illegally entering the United States in 1982, respondent had an extensive criminal record in Northern Ireland, beginning with convictions as a juvenile for burglary and larceny.[2] On May 2, 1980, respondent and three other PIRA members drove in a hijacked van to a private house in North Belfast, while the van driver was held captive; they seized the house and, from it, attacked a car full of British soldiers, killing a British officer. Respondent was arrested and tried in Belfast. After the close of evidence but prior to verdict, respondent and seven others escaped from a maximum security prison. On June 12, 1981, respondent was convicted *in absentia* of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization. He was sentenced to life imprisonment. App. 2a, 46a-47a, 84a-88a.

2. In early 1982, respondent entered the United States under an alias. On June 18, 1983, he was arrested by INS agents while working at a bar in Manhattan. INS immediately instituted deportation proceedings, whereupon respondent applied for asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158. App. 3a, 157a; C.A. App. 1-13.[3]

[2] He was later convicted in 1973 of possessing a firearm and in 1974 of possessing 80 pounds of explosives. He was sentenced to 10 years' imprisonment for the latter crime and then was convicted of attempted prison escape. Pet. App. 46a-47a.

At his deportation hearing in September 1986, respondent withdrew his application for asylum, waived his right to seek that relief, disavowed any intention to seek withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), and admitted that he was deportable. App. 49a-50a.[4] Under Section 243(a) of the Act, an alien is to be deported to the country he designates, "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." 8 U.S.C. 1253(a). Respondent designated Ireland, but INS objected on the ground that he might avoid punishment there, which would be "prejudicial to the interests of the United States" in combatting terrorism. The immigration judge nevertheless

[3] In August 1983, at the request of the United Kingdom, the United States sought extradition of respondent. On December 12, 1984, Judge Sprizzo denied the application, holding that respondent's crimes fell within the exception in the extradition treaty between the two countries for offenses of a "political character." *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984). That order was not appealable, and the government's attempt to obtain collateral review of it in a declaratory judgment action was unsuccessful. *United States* v. *Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), aff'd, 786 F.2d 491 (2d Cir. 1986).

[4] Respondent admitted that he had entered the United States without valid immigration documents, in violation of 8 U.S.C. 1182(a)(20). His admissions also established that he was deportable under 8 U.S.C. 1182(a)(19) because he obtained entry by fraud or willful misrepresentation. App. 149a. Respondent did not admit the additional charges that he was deportable because he had been convicted of a crime of moral turpitude and two crimes with an aggregate sentence of five years or more; entered the United States to engage in activities prejudicial to the public interest or endangering the safety, welfare, or security of the United States; and advocated the unlawful assaulting or killing of officers of an organized government. 8 U.S.C. 1182(a)(9), (10), (27) and (28)(F)(ii).

ordered respondent deported to Ireland, App. 156a-159a,[5] and the Board of Immigration Appeals (BIA) affirmed. *Id.* at 148a-155a.

The case then was certified to the Attorney General, pursuant to 8 C.F.R. 3.1(h). On June 9, 1988, Attorney General Meese reversed the BIA's decision and ordered respondent deported to the United Kingdom. App. 116a-130a. He concluded that deporting respondent to Ireland would be "prejudicial to the interests of the United States" because it would conflict with the policy of the United States to ensure that individuals who commit acts of violence against democratic states are punished quickly and lawfully, would undermine the United Kingdom's "confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern," and "might well prejudice broader aspects of our bilateral relationship." *Id.* at 126a-127a.

3. While the matter was pending before Attorney General Meese, respondent moved to withdraw his designation of Ireland and designate another country, and to reopen the proceedings so that he could apply for asylum and withholding of deportation. As grounds for this motion, respondent asserted that an Irish Extradition Act, which became effective on December 1, 1987, would result in his extradition to the United Kingdom if he were deported to Ireland. C.A. App. 364-365, 372-373. The BIA declined to allow respondent to make a redesignation. But by a 3-2

[5] Four days after the immigration judge's decision, respondent filed a habeas corpus petition seeking immediate deportation to Ireland. His petition was denied. *Doherty* v. *Meese*, 808 F.2d 938 (2d Cir. 1986). The court of appeals noted that respondent sought this relief because of a supplementary extradition treaty between the United States and the United Kingdom, which had been ratified by the Senate and was then pending before the British House of Commons. As relevant here, the supplementary treaty eliminated the "political offense" exception, on which Judge Sprizzo had relied in declining to authorize extradition of respondent. 808 F.2d at 940; see note 3, *supra*.

vote, the BIA granted his motion to reopen, albeit on a different ground: although the INS had taken the position from the outset that respondent should be deported to the United Kingdom rather than Ireland, the BIA was of the view that respondent "could not have been expected to anticipate that he would not be deported to his country of choice," and that his failure to file for asylum at an earlier date was "excusable" for this reason. App. 99a; see *id.* at 92a-115a.

4. The case was once again certified to the Attorney General. On June 30, 1989, Attorney General Thornburgh disapproved the BIA's order and denied respondent's motion to reopen for three separate reasons. App. 46a-91a.[6]

First, Attorney General Thornburgh rejected the BIA's notion that reopening was justified because Attorney General Meese refused to accede to respondent's request that he be deported to Ireland. App. 58a-59a, 65a-67a. He found it "unlikely" that the Attorney General's invocation of his express statutory authority to reject a deportee's designation could "ever constitute new evidence," but reasoned that "[i]t certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interest should prevail." *Id.* at 58a-59a. Furthermore, the Attorney General concluded, "[t]he ultimate decision in an administrative process cannot itself constitute 'new' evidence to justify reopening"; otherwise, "there could never be finality in the process." *Id.* at 67a.

[6] The Attorney General found it unnecessary to decide whether respondent had established a prima facie case of eligibility for asylum or withholding of deportation, noting that he had discretion to deny reopening even if respondent had done so. App. 64a-65a n.21 (citing *INS* v. *Abudu*, 485 U.S. 94 (1988)).

The Attorney General similarly concluded that Ireland's 1987 Extradition Act, which gave effect to the European Convention on the Suppression of Terrorism, did not warrant reopening. App. 59a, 67a-74a; C.A. App. 459-467. He found this event to be "neither sudden nor unforeseeable," since Ireland had signed the Convention in February 1986, "more than six months *before* respondent withdrew his applications for asylum and for withholding of deportation." App. at 67a-68a.[7]

Second, the Attorney General determined that respondent had knowingly and intelligently waived any claim to asylum or withholding of deportation at his September 1986 hearing. App. 60a, 79a-81a. He found the waiver to be "part of a calculated plan to [try to] ensure immediate deportation to Ireland before the United Kingdom ratified its [supplementary extradition] treaty with the United States, which would have allowed [respondent] to be extradited directly to the United Kingdom." *Id.* at 60a; see note 5, *supra*. In the Attorney General's judgment, respondent assumed the risk that his tactical choice might not succeed, and "the interests in the integrity of the administrative process and finality of decision"—and in preventing manipulation of the regulatory process—required that his waiver be given effect. App. 79a, 81a.

Third, the Attorney General denied reopening on the ground that respondent would not ultimately be granted asylum or withholding of deportation. App. 60a-61a, 81a-91a. The Attorney General decided, in his discretion, that he would not grant respondent asylum, citing a number of reasons: (i) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment"; (ii) "the United States Government, through the State Department, has specifically determined that it is in the foreign policy interest of this country that respondent be deported to the United Kingdom"; (iii) "respondent knowingly and intentionally waived his claim to asylum"; and (iv) respondent's "membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, * * * suggest that he is not deserving of equitable relief." App. 82a.

Similarly, the Attorney General found respondent ineligible for withholding of deportation under two statutory exceptions, even assuming he would otherwise qualify for that relief. First, the Attorney General found "serious reasons for considering that the alien has committed a serious nonpolitical crime outside of the United States" (8 U.S.C. 1253(h)(2)(C)), based both on the crimes respondent indisputably committed, and on probable cause to believe that he committed other violent crimes against innocent civilians as an active member of the PIRA, which the United States officially regards as a terrorist organization. App. 83a-88a & n.50, 89a. The Attorney General also found respondent ineligible because, through his active role in the PIRA—serving as an officer, gathering ammunition, distributing arms, and training and drilling other PIRA members—he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion" (8 U.S.C. 1253(h)(2)(A)). App. 89a-91a.

5. The court of appeals sustained Attorney General Meese's order directing respondent's deportation to the United Kingdom, but set aside Attorney General Thornburgh's order denying respondent's motion to reopen the proceedings. App. 1a-45a.

[7] The Attorney General further held that the Extradition Act did not in any event warrant reopening, because (i) that Act did not alter the provisions of U.S. immigration law governing respondent's deportation (App. 69a-70a); (ii) respondent was subject to extradition from Ireland to the United Kingdom even before the new Extradition Act, a point respondent himself previously had made in urging affirmance of the immigration judge's order (*id.* at 70a-72a); and (iii) any change in Irish law was irrelevant because Attorney General Meese had decided (and Attorney General Thornburgh agreed) that respondent should be deported to the United Kingdom, not Ireland (*id.* at 74a).

a. In unanimously sustaining Attorney General Meese's order, App. 7a-9a, the court held that Section 243(a) of the Act confers "broad discretion" to decide what is prejudicial to national interests, which "requires an essentially political determination" that is "essentially unreviewable" by a court. *Id.* at 8a. The court accepted Attorney General Meese's explanation that "deporting [respondent] to the Republic of Ireland, indeed anywhere but the United Kingdom, would harm our relationship with the United Kingdom and would contradict our policy of punishing violence against democratic nations." *Id.* at 9a. In the court's view, "[j]udgments of this nature are surely within the scope of the attorney general's discretion under § 243(a)," and it was "not entitled to second-guess them." *Ibid.*

b. By contrast, the court, over Judge Lumbard's dissent, set aside Attorney General Thornburgh's order denying respondent's motion to reopen, holding, *inter alia,* that the Attorney General could not consider these same anti-terrorism and other foreign policy factors when passing on respondent's asylum request. App. 9a-29a. The court began by referring to the three situations discussed in *INS* v. *Abudu,* 485 U.S. 94 (1988), in which a motion to reopen for the purpose of applying for asylum or withholding of deportation may be denied. But unlike this Court in *Abudu,* it regarded those situations as exclusive. App. 11a-12a.[8]

[8] In *Abudu,* the Court stated (485 U.S. at 104-105):

> There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. * * * Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence, 8 CFR § 3.2 (1987), or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially, 8 CFR § 208.11 (1987). * * * Third, in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that, even if they were met, the movant would not be entitled to the discretionary grant of relief.

i. The court first noted that Attorney General Thornburgh did not base his decision on a finding that respondent failed to establish a prima facie case for substantive relief. See note 6, *supra.* It therefore assumed for purposes of the appeal that respondent had satisfied that burden. App. 15a.

ii. The court next held that the Irish Extradition Act and Attorney General Meese's decision satisfied respondent's burden of producing "previously unavailable, material evidence" or a "reasonable explanation" for why he had not theretofore requested asylum or withholding of deportation. App. 12a-15a. The court ruled that Attorney General Thornburgh should not have looked to whether those events were foreseeable when respondent waived his right to seek that relief, because, in its view, an alien should not have to consider anything beyond the facts and law in existence when he makes such a tactical decision. *Id.* at 13a.[9] The court also questioned whether Attorney General Meese's decision was forseeable: it acknowledged that the Attorney General's power to reject an alien's designation is "expressly conferred by the statute to be sure," but it believed that because this power had not previously been exercised, respondent had a "reasonable expectation" that he would be deported to Ireland. *Id.* at 14a. In addition, the court faulted the Attorney General for taking a different view of the facts than the BIA, and it deferred to the BIA's judg-

[9] The court also refused to accept the Attorney General's conclusion that respondent waived his right to apply for asylum and withholding of deportation in 1986, and thereby assumed the risk that the Attorney General might reject his designation of Ireland or that Ireland might amend its extradition laws. App. 27a-28a. The court did not disagree with the Attorney General's finding that these were "deliberate tactical decisions" by respondent, but it found the Attorney General's concern for the "integrity of the administrative process" insufficient to justify his denial of reopening. *Ibid.*

ment, rather than that of the Attorney General, on the theory that the BIA has experience in identifying meritorious cases. *Ibid.*

iii. The court further held that Attorney General Thornburgh erred in deciding that respondent would not ultimately obtain asylum or withholding of deportation. App. 15a-27a. With respect to asylum, the court held that the Attorney General could not base his denial of relief on the United States' policy that those who commit acts of violence against a democratic state should receive prompt and lawful punishment or on other foreign policy interests. *Id.* at 17a-27a. It acknowledged that these same factors were "clearly relevant" to Attorney General Meese's disapproval of respondent's designation of Ireland as the country of deportation, *id.* at 26a, and that the Attorney General has "broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests." *Id.* at 18a. But it found these to be "improper factors" in the asylum context. *ibid.* The court pointed to no preclusion of such factors in the text of Section 208, which, it recognized (App. 17a-18a), broadly provides that an alien who satisfies the threshold requirement of being a refugee "may" be granted asylum "in the discretion of the Attorney General." 8 U.S.C. 1158(a). Instead, in holding that the Attorney General has a "more limited role" and only "limited discretion" in asylum cases, the court relied on what it regarded as the "spirit" of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102), drawn from its legislative history, App. 19a-25a, and on deference to the BIA's practice in prior asylum cases. *Id.* at 24a-25a.

With respect to withholding of deportation, the court held that the Attorney General could not rely on the two exceptions to that relief without affording respondent a hearing. App. 15a-17a. The court believed that the Attorney General's power to deny a motion to reopen based on factors other than the alien's failure to establish a prima facie

case or lack of new evidence is limited to cases in which the ultimate relief is discretionary, and that he therefore "simply has no discretion" to deny relief based on a finding of ineligibility for withholding of deportation. *Id.* at 16a.

c. Judge Lumbard dissented. App. 29a-45a. He stressed that reopening is "committed to the Attorney General's discretion" and " 'disfavored in deportation proceedings,' " *id.* at 31a-32a (quoting *Abudu,* 485 U.S. at 107), and that "[w]hen the Attorney General decides, after a careful review of the voluminous record, that a drawn-out case such as this one no longer merits attention, we are in no position to contradict that judgment." App. 33a. Judge Lumbard also criticized the majority for according more deference to the BIA than to the Attorney General, because "[m]atters which concern asylum and deportation are primarily matters of foreign policy and political judgment," and "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a. And Judge Lumbard questioned whether the *Abudu* analysis applies here, because its reasons for denying reopening were "clearly not meant to be exhaustive." *Id.* at 34a-35a. Even on the premise that the *Abudu* framework controlled, however, he believed the Attorney General had properly denied reopening.

First, Judge Lumbard disputed the majority's holdings that the Attorney General may not take anti-terrorism or other foreign policy concerns into account in exercising his discretion on asylum requests, and that his authority to deny asylum to eligible aliens "is limited to a narrow class of cases." App. 37a. He noted that "[w]hile Congress has established rules for determining who is eligible for asylum, it has created no rules for determining who among those eligible for asylum should receive that relief," instead committing that determination to 'the discretion of the Attorney General.'" *Ibid.* (quoting 8 U.S.C. 1158(a)). In Judge Lumbard's view, this is "the broadest language possible," and, if anything, it affords the Attorney General wider

latitude than he has to reject an alien's designation of the country of deportation under Section 243(a), under which the majority sustained the Attorney General's consideration of anti-terrorism policies and foreign relations. App. 36a-37a. Judge Lumbard also found it significant that "Congress specifically rejected making asylum mandatory upon the appropriate showing," which demonstrates that "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." *Id.* at 36a.

Second, Judge Lumbard rejected the notion that Attorney General Meese's decision and the Irish Extradition Act required reopening. App. 38a-41a. He analogized respondent's position to that of a criminal defendant who cannot withdraw a guilty plea "merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* at 40a (quoting *Brady* v. *United States,* 397 U.S. 742, 757 (1970)). Judge Lumbard also believed that Attorney General Meese's decision could not be regarded as either "new" or "evidence," since it was the final administrative decision in respondent's case, and that the Extradition Act—"if it [was] evidence at all"—was not "new," in light of the Attorney General's finding that respondent "was extraditable from the Republic of Ireland to the United Kingdom even prior to December 1, 1987 on the basis of longstanding provisions of Irish law." App. 40a-41a.

Third, Judge Lumbard would have sustained the Attorney General's finding that respondent is ineligible for withholding of deportation under two exceptions to that relief. App. 42a-45a. Here, Judge Lumbard reasoned, "[s]ince the record is replete with [respondent's] admissions of actions constituting violations of § 243(h)(2), and since the Attorney General's determination that [respondent] failed the test in subsection (C) is a model of a reasoned decision based on the record, * * * he properly denied the motion to reopen to the extent it was for the purpose of applying for withholding." App. 42a-43a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the authority of the Attorney General to act in the national interest in asylum and deportation matters. The court of appeals' decision—holding that the Attorney General abused his discretion in declining to reopen deportation proceedings to consider an asylum application by a convicted murderer and member of a terrorist organization—is unprecedented. The court's holding that the Attorney General may not consider the Nation's policies regarding terrorism and other foreign relations concerns in exercising his discretion to grant or deny asylum cannot be reconciled with the text of Section 208(a) of the Immigration and Nationality Act, which confers unqualified discretion on the Attorney General; with the text and background of other provisions of the Act; or with this Court's decision in *INS* v. *Cardoza-Fonseca,* 480 U.S. 421 (1987), and other decisions affirming the role of foreign policy considerations in this area. In addition, it threatens to undermine the Executive Branch's ability to take account of important foreign relations and national security concerns in the Nation's refugee policies, to promote respect for the rule of law and democratic institutions in world affairs, and to advance forceful and credible measures to combat terrorism.

The decision below also impermissibly intrudes into the Attorney General's discretion in the administration of the immigration laws by engaging in essentially de novo review of his rulings on motions to reopen deportation proceedings. This approach to judicial review is inconsistent with numerous decisions of this Court, most recently *INS* v. *Abudu,* 485 U.S. 94 (1988). It invites disruption and delay of deportation proceedings by encouraging resort to the extraordinary remedy of reopening on the basis of unrelated rulings or tangential developments that have no bearing on the merits of a claim. Review by this Court therefore is warranted.

1. The court of appeals held that in deciding whether to grant asylum to an alien, the Attorney General has only a "limited role" and "limited discretion," App. 25a, and cannot consider "factors such as the government's geopolitical and foreign policy interests"—including "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Id.* at 21a, 26a. These are unprecedented and erroneous limitations on the Attorney General's discretion. The support of democratic governments and the rule of law—and the denunciation of terrorism—are central to this Nation's foreign policy.[10] It is inconceivable that Congress intended to require the Attorney General to ignore such basic principles when deciding whether to grant an alien "so great a privilege as asylum in the United States." *Id.* at 38a n.3 (Lumbard, J., dissenting).

a. Nothing in the text of Section 208(a) supports such a result. Section 208(a) provides that an alien "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that he is a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). Although "refugee" status is a necessary condition for asylum, such status does not entitle an alien to relief; that is a matter expressly committed to the Attorney General's discretion. Moreover, although the Act contains standards to guide the Attorney General's determination of whether an alien is a refugee for these purposes (see 8 U.S.C. 1101(a)(42)(A)), and thereby limits his discretion to *grant* asylum, it does not contain any standards limiting the Attorney General's discretion to *deny* asylum. The statutory conferral of discretion in this respect is unqualified. There is thus no textual basis for the narrow ambit of discretion to which the court of appeals has confined the Attorney General in asylum cases.

[10] As former Secretary of State George Shultz stated, in materials made part of the record in this case: "[D]emocracy rejects indiscriminate or improper use of force and relies instead on the peaceful settlement of disputes through legitimate political processes. * * * [W]e seek to build a world which holds no place for terrorist violence, a world in which human rights are respected by all governments, a world based on the rule of law." C.A. App. 137. For these reasons, "terrorists * * * are ideological enemies of the United States." *Ibid.*

b. Nor is there any support for the court of appeals' ruling in this Court's decisions construing Section 208(a). The Court stressed in *Cardoza-Fonseca* that "[t]he Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee," and that "a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.*' " 480 U.S. at 428 n.5 (1987) (quoting Section 208(a)). The Court cited its similar observation in *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984), that "[m]eeting the definition of 'refugee' * * * does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a)." As the emphasis supplied by the Court in both cases suggests, these statements were integral to the Court's explanation of the place of Section 208(a) in the statutory scheme.

The Court in *Cardoza-Fonseca* contrasted Section 208(a) to Section 243(h) of the Act, which provides for withholding of deportation of a refugee to a country where his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h) implements the *nonrefoulment* requirement in Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176, to which the United States is bound by accession to the United Nations Protocol Relating to the Status of Refugees, Nov. 1,

1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. Withholding of deportation is mandatory, but it is "country specific" and does not bar deportation to a third country. *Cardoza-Fonseca,* 480 U.S. at 428 n.6, 429 & n.7, 440-441; *Stevic,* 467 U.S. at 416.

Asylum "is a greater form of relief," because "[w]hen granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to numerical limitations and the applicable regulations." 480 U.S. at 428-429 n.6. In contrast to Section 243(h), Section 208(a) establishes a "discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees." 480 U.S. at 441. This contrast follows from the fact that Section 208(a) implements not the mandatory provisions of Article 33 of the United Nations Convention, but "instead corresponds to Article 34," which "provides that the contracting States 'shall as far as possible facilitate the assimilation and naturalization of refugees.' " 480 U.S. at 441. The Court pointed out in *Cardoza-Fonseca* that Article 34 only "provides for a precatory, or discretionary benefit" for persons found to be refugees and is "[l]ike § 208(a)" in this respect. 480 U.S. at 441. In short, Section 208(a) does no more than establish a "discretionary mechanism" by which Executive Branch officials may implement a provision of the Convention that is itself "precatory" and "discretionary"; it therefore should not be construed to impose rigid, judicially enforceable limitations on the Attorney General's discretion to deny asylum to a particular alien.

c. The court of appeals' holding is all the more anomalous in light of the court's ruling that the Attorney General properly rejected respondent's designation of Ireland as the country of deportation under Section 243(a), based on a consideration of the same anti-terrorism and other

foreign policy concerns that it found wholly impermissible in the asylum context. App. 7a-9a. As Judge Lumbard explained, *id.* at 36a-37a, a comparison of the text of Sections 208(a) and 243(a) does not suggest such dramatically different outcomes. Both Sections commit the ultimate decision to the "discretion" of the Attorney General, subject only to his finding that a specified threshold requirement is satisfied—that the alien is a "refugee," or that deportation to the designated country would be "prejudicial to the interests of the United States." *Ibid.*

d. In the end, in imposing judicially created limitations on the Attorney General's discretion, the court of appeals relied entirely on inferences it drew from the legislative history of the Refugee Act of 1980. App. 20a-21a, 23a-24a. That tack reflected a grave interpretive error. As this Court has said with specific reference to Section 208(a), there is a "strong presumption that Congress expresses its intent through the language it chooses," and the plain import of that language (here, an unqualified grant of discretion) can be overcome, if at all, only by finding a "clearly expressed legislative intention" to the contrary. *Cardoza-Fonseca,* 480 U.S. at 432 n.12. That daunting standard was not met even under the court of appeals' view of the legislative history, because the court itself found "some ambiguity" on the issue. App. 24a. In any event, the court seriously misunderstood the background of the Act.

The Refugee Act, in the court's view, eliminated the Attorney General's discretion to consider "geopolitical and foreign policy interests" because *eligibility* for asylum is established, through the definition of the term "refugee," in "politically neutral terms." App. 21a. But this analysis ignores the fact that the statute does not provide that those who meet the definition are *entitled* to asylum. What is more, the legislative history discussed in the materials

cited by the court of appeals[11] did not involve Section 208(a). Rather, it concerned Congress's removal of the prior ideological and geographical restrictions on eligibility for conditional entry of aliens outside the United States under former Section 203(a)(7)(A)(i) of the Act, 8 U.S.C. 1153(a)(7)(A)(i) (1976), which applied only to aliens from Communist countries or the Middle East. In the Refugee Act, Congress replaced that provision with a new Section 207, 8 U.S.C. 1157, which provides for the admission of "refugees" from outside the United States, subject to flexible numerical limitations, and permits the Attorney General, in his "discretion," to admit such a refugee. 8 U.S.C. 1157(c)(1).

As under Section 208(a), the fact that Congress, by its definition of the term "refugee," removed the ideological and geographical restrictions on the aliens who are *eligible* for the exercise of the Attorney General's discretion under Section 207 does not support the court of appeals' far different and more sweeping proposition that Congress imposed strict limitations on the authority of the Attorney General to decide who among eligible refugees will be *admitted*—and, in particular, that Congress precluded all consideration of anti-terrorism and other foreign policy concerns. That proposition cannot be squared with the text of Section 207 itself, which specifically identifies "the foreign policy interests of the United States" as a proper factor to consider in admitting refugees, 8 U.S.C. 1157(e)(6).[12] The court of appeals also overlooked another

[11] See App. 21a (citing *Stevic*, 467 U.S. at 425-427; S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); and Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 36 (1981)).

[12] As the Chairman of the House Committee on Foreign Affairs stated, in supporting the Refugee Act, "the determination of the numbers and kinds of refugees to be admitted to the United States are issues involving U.S. foreign policy considerations." H.R. Rep. No. 608, 96th Cong., 1st Sess. 8 (1979).

important aspect of the history of the provision—that Congress specifically rejected the Senate proposal to make the granting of asylum *mandatory* upon an appropriate showing of persecution, and instead adopted the House provision committing that decision to the Attorney General's discretion, without statutory qualifications. See *Cardoza-Fonseca*, 480 U.S. at 441-442. Thus, as Judge Lumbard observed, "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." App. 36a.[13]

In addition, the notion that the Attorney General was barred from considering the foreign policy concern that was at the core of his decision in this case—combatting terrorism—is refuted by the basic definition of "refugee" in 8 U.S.C. 1101(a)(42), on which the court of appeals, ironically, placed so much emphasis. That Section provides that the term "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In light of his own past conduct, this description readily embraces respondent. See pages 28-29, *infra*.[14]

[13] The court below also relied on the statement in the House Report that "[t]he Committee intends to monitor closely the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect." App. 24a (quoting H.R. Rep. No. 608, *supra*, at 18). Nothing in this statement implies that the Attorney General is barred from taking foreign policy concerns into account. In addition, an expression of intent by a congressional committee to "monitor closely" the exercise of discretion under an Act of Congress—*e.g.*, so that Congress can consider statutory amendments if necessary—furnishes no basis for *judicial* imposition of limitations on the Attorney General's discretion that Congress did not enact into the law.

[14] Even if respondent were, for some reason, not technically covered by this mandatory exclusion, the Attorney General could consider the obvious thrust of the policies that this and similar provisions of the Act embody when deciding, in the exercise of his discretion, whether to grant asylum to someone with respondent's background. See *McMullen*

e. If any doubt remained about the legitimacy of the factors the Attorney General considered, the court of appeals should have deferred to what is, at the very least, a reasonable construction of Section 208(a) by the Attorney General, the official charged by Congress with the administration of the Act under 8 U.S.C. 1103. See *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2676-2677 (1990); *Cardoza-Fonseca*, 480 U.S. at 445-446 & n.29. Far from doing so, however, the court expressly deferred to inferences from BIA decisions in prior asylum cases (which did not involve the question presented here), in *derogation* of the authoritative construction by the Attorney General in this case. App. 24a-25a. This error, which infects other aspects of the court of appeals' opinion as well,[15] greatly subverts the principle of deference; as Judge Lumbard put it, "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a.

f. The court of appeals' ruling conflicts with decisions of this Court recognizing that asylum policies, and immigration policies generally, are inextricably interwoven with the Nation's foreign policy interests. Most recently, in *Abudu*, which likewise concerned asylum, the Court held that the reasons for deference to agency decisions apply with particular force under the immigration laws because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations." 485 U.S. at 110.[16]

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v. *INS*, 788 F.2d 591, 599-600 (9th Cir. 1986); 8 U.S.C. 1253(h)(2); 8 C.F.R. 208.8(f)(1).

[15] See also App. 14a (faulting the Attorney General for taking a different view of the facts than the BIA and deferring to the BIA, rather than the Attorney General, regarding circumstances warranting reopening); *id.* at 28a (criticizing the Attorney General's invocation of his authority to review the BIA's decisions in this case).

[16] See also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101-102 n.21 (1976); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Galvan* v. *Press*, 347

Furthermore, other courts of appeals, while not addressing the precise question of whether the Attorney General may consider the factors on which he relied in this case, have nevertheless made clear that foreign policy concerns are properly and intimately associated with asylum decisions. See *Alvarez-Flores* v. *INS*, 909 F.2d 1, 4 n.1 (1st Cir. 1990) (the "connection of asylum and deportation to issues of foreign policy may counsel special deference to INS decisions"); *M.A.* v. *INS*, 899 F.2d 304, 313-314 (4th Cir. 1990) (en banc) (deferring to agency application of Section 208(a) because "numerous Supreme Court decisions recognize the intimate connection between immigration decisions and foreign policy" committed to the political branches); *Kashani* v. *Nelson*, 793 F.2d 818, 827-828 (7th Cir.) (finding no jurisdiction, but noting that "the District Director's decision whether to grant an asylum request involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the political branches of the government"), cert. denied, 479 U.S. 1006 (1986). The decision below is inconsistent with the view of the asylum process expressed by these other courts of appeals.

g. The decision below will, if uncorrected, fundamentally distort the asylum process. It will lead to perverse results, by allowing the Attorney General to deny asylum for the lesser reasons of "administrative fairness and efficiency," App. 24a, but not for far greater reasons of national security or foreign relations. It will undermine the fairness of the Nation's immigration laws—and the perception of such fairness—by conferring special relief on terrorists and convicted criminals who unlawfully enter the United States, while thousands of refugees and others

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U.S. 522, 530 (1954); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893).

seeking to enter the United States lawfully must wait their turn abroad. And it will frustrate the Attorney General's ability to administer the asylum process evenhandedly throughout the country, especially since aliens who believe that they may be able to establish refugee status under the relatively lenient standard for showing a "well-founded fear" of persecution can be expected to seek to apply for the broader relief of asylum in the Second Circuit. Furthermore, if the United States can no longer refuse the humanitarian relief of asylum to aliens who have committed acts of terrorism against other democratic nations, the credibility of this Nation's efforts to combat terrorism will be substantially undermined. Review by this Court therefore is warranted.

2. The decision below also fundamentally departs from settled principles governing judicial review of decisions denying motions to reopen deportation proceedings. At his deportation hearing in 1986, respondent withdrew his asylum application and waived his right to seek asylum or withholding of deportation, hoping to bring about his immediate deportation to Ireland before a new extradition treaty between the United States and the United Kingdom came into force. See note 5, *supra*. After that approach failed, respondent repudiated his tactical choice and sought to reopen the proceedings to seek the special relief he previously disavowed. The Attorney General properly refused to countenance such manipulation of the administrative process.

This Court has repeatedly held that whether to grant a motion to reopen deportation proceedings under applicable regulations is committed to the Attorney General's discretion. *Abudu*, 485 U.S. at 105-106; *INS* v. *Rios-Pineda*, 471 U.S. 445, 449 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981). As a general rule, courts may not

order reopening of any administrative proceeding "except in the most extraordinary circumstances," *Abudu*, 485 U.S. at 107 n.11, upon "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). And "the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context." *Abudu*, 485 U.S. at 110. The court of appeals failed to respect these principles here, since the Attorney General's refusal to allow reopening plainly did not involve the "unreasoned or arbitrary exercise of discretion." *Rios-Pineda*, 471 U.S. at 451.

a. The court of appeals believed that reopening was required in light of two events—Attorney General Meese's rejection of respondent's designation of Ireland as the country of deportation and passage of the Irish Extradition Act. App. 12a-15a. Neither of these legal developments (one in the United States and one in Ireland) constituted newly discovered and material *evidence*, much less evidence of persecution in the *United Kingdom*, where respondent is to be deported under the Attorney General's orders. Since neither development went to the merits of an asylum or withholding of deportation claim—and therefore would not have changed the outcome even if respondent had filed such a claim in a timely manner—Attorney General Thornburgh was entirely justified in rejecting them as new evidence warranting reopening. See *Taylor* v. *Illinois*, 484 U.S. 400, 414 & n.18 (1988) (new trial granted only if newly discovered evidence probably would change the outcome), cited with approval in *Abudu*, 485 U.S. at 110.

The court of appeals also viewed Attorney General Meese's decision and the Irish Extradition Act as furnishing a "reasonable explanation" for respondent's failure to

apply for asylum or withholding of deportation at an earlier date. App. 13a, 14a; see *Abudu*, 485 U.S. at 104-105. This holding was also wrong. As Attorney General Thornburgh explained, it is doubtful that the Attorney General's invocation of his express statutory authority to reject an alien's designation of a country of deportation could ever constitute the sort of "new" development justifying reopening; but it clearly was not such a development in this case, since respondent was aware of the INS's opposition to his designation when he waived his right to apply for asylum and withholding of deportation. App. 58a-59a. Moreover, Attorney General Meese's rejection of respondent's designation (which the court of appeals *sustained*) was nothing more than the final decision in the administrative proceedings concerning respondent's deportation. The end of a proceeding cannot be considered a new development justifying reopening of that very proceeding. As Attorney General Thornburgh explained, if an adverse final decision in a proceeding were itself sufficient to justify reopening, "there could never be finality in the process," *id.* at 67a, and "the regulatory process could be manipulated at will." *Id.* at 81a. Thus, here, as in *Rios-Pineda*, the denial of reopening was proper because it "was grounded in legitimate concerns about the administration of the immigration laws." 471 U.S. at 451-452.

The 1987 Irish Extradition Act likewise did not furnish a legally sufficient justification for reopening. While a change in the provisions of the *United States'* immigration laws might justify reopening of a deportation proceeding if it alters the legal standards that directly govern the case (cf. *Abudu*, 485 U.S. at 103 n.8), any change in *Irish* law wrought by the 1987 Extradition Act had no such effect on the legal standards governing respondent's deportation or his eligibility for asylum or withholding of deportation—

especially since under the orders of both Attorneys General, respondent will be deported to the United Kingdom, not Ireland. App. 69a-70a, 74a.

Furthermore, the Attorney General found that the 1987 Extradition Act was but the final step in a widely publicized process of extradition law reform in Ireland going back to 1985, and that, as respondent stated on at least four occasions in these proceedings, he was extraditable from Ireland to the United Kingdom even before the 1987 Act was adopted. App. 67a-69a & n.25, 70a-71a. Thus, at most, the 1987 Act confirmed the possibility that respondent would ultimately be returned to the United Kingdom even if he were first deported to Ireland. *Id.* at 41a (Lumbard, J., dissenting). The court of appeals did not dispute the Attorney General's assessment of the practical significance of the new Irish Extradition Act, and that assessment is in any event subject to review only for abuse of discretion. *Abudu*, 485 U.S. at 111. Accordingly, even if we assume that the Attorney General would have been required to take a truly new and unforeseen development in Irish law into account in deciding whether to reopen the proceedings, he did not abuse his discretion in declining to do so on the basis of the 1987 Extradition Act.

At bottom, respondent seeks to reopen his deportation proceedings because some of the legal and factual circumstances he anticipated at the time he waived his right to asylum and withholding of deportation (and conceded his deportability) did not come to pass. This will not do. Reopening requires more than an explanation of an alien's motivations for his tactical choices; it requires a legally sufficient justification. As Attorney General Thornburgh (and Judge Lumbard in dissent) observed, respondent is in the same position as a criminal defendant who pleaded guilty in the hope that the judge might impose a lenient sentence or on an understanding of the law that, while

reasonable, later proves to be erroneous. The criminal defendant has no right to withdraw his plea in those circumstances, if it was voluntarily given on the basis of competent advice. Respondent likewise has no right to repudiate his waiver and have his case reopened. See App. 39a-41a, 81a & nn. 39, 40 (citing *United States* v. *Broce*, 488 U.S. 563 (1989), and *Brady* v. *United States*, 397 U.S. 742, 757 (1970)).[17]

b. The Attorney General declined to reopen the proceedings to permit respondent to apply for withholding of deportation for the additional reason that even if respondent were able to show that he meets the basic eligibility standard in Section 243(h)(1), he would not ultimately be entitled to that relief. Withholding of deportation is unavailable if the Attorney General makes any one of four possible determinations under Section 243(h)(2). Attorney

[17] In support of his motion to reopen, respondent also submitted a 1988 report by Amnesty International (C.A. App. 452-455, 511-558), a book on which that report drew (*id.* at 559-709), and an affidavit of his mother, accompanied by newspaper articles (*id.* at 407-418, 450). The BIA found this evidence material and sufficient, if unrebutted, to make out a "prima facie claim of a well-founded fear of persecution." App. 99a. The Attorney General, however, found that it did not warrant reopening because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence that was presented." App. 75a. Because the court of appeals held that Attorney General Meese's decision and the Irish Extradition Act constituted "new evidence" and a "reasonable explanation" for reopening, it did not decide whether the factual material submitted by respondent also satisfied that standard. *Id.* at 15a. For the reasons given by the Attorney General, *id.* at 74a-78a, it did not; at the very least, the Attorney General did not abuse his discretion in so holding. Although this issue might be left to the court of appeals to resolve (if necessary) on remand following a decision by this Court, we reserve the right to urge the Court to reach this issue and sustain the Attorney General's resolution of it if appropriate for a complete disposition of the case.

General Thornburgh made two such determinations on the basis of the record and respondent's admissions: (1) "there are serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside of the United States" (8 U.S.C. 1253(h)(2)(C)); and (2) respondent "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion" (8 U.S.C. 1253(h)(2)(A)).

The court of appeals overturned this ruling by the Attorney General as well, holding that where an alien establishes a prima facie case of entitlement to withholding of deportation and introduces previously unavailable, material evidence, "the attorney general simply has no discretion" to deny reopening on the ground that the alien would be ineligible for relief. App. 16a. Once again, the court impermissibly imposed rigid limitations on the Attorney General's discretion to "creat[e] official procedures for handling motions to reopen deportation proceedings so as readily to identify those cases raising new and meritorious considerations." *Jong Ha Wang*, 450 U.S. at 145. Where, as here, the record already developed in the case establishes a reasonable basis for concluding that the motion is not "meritorious"—whether because the alien does not satisfy a basic eligibility requirement or, as here, because an exception is applicable—it is entirely appropriate for the Attorney General to deny the motion. Cf. *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976) ("agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"). As the Court explained in *Abudu*, the alien bears a "heavy burden" in seeking reopening, analogous to that of a defendant seeking a new trial based on newly discovered evidence. 485 U.S. at 109-110. Where the Attorney General concludes that the supposedly "new" evidence would probably not change the outcome because it does not rebut evidence already in the

record that renders the alien ineligible, the alien has not carried his burden. That was the case here.

As Judge Lumbard pointed out, respondent admitted all of the following facts at his 1984 extradition hearing (App. 43a-44a):

> He was an officer in the Provisional Irish Republican Army ("PIRA") and committed acts dangerous to others on behalf of the PIRA, which the United States Department of Justice has classified as a terrorist organization * * *. For example, in 1973, [respondent] was convicted of and imprisoned for a firearms violation. In 1974, he was convicted of and imprisoned for smuggling 80 pounds of explosives in a car hijacked by the PIRA. In 1980, he drove several of his PIRA confederates to a private Belfast house, while the van driver was held captive; took over the house and held hostage the family inside; and engaged in a firefight that resulted in the death of Captain Westmacott of the British Army.

These admissions fully support the Attorney General's conclusions, which were based on an exhaustive review of the record. App. 81a-91a. The Attorney General's determination that there are "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside the United States," 8 U.S.C. 1253(h)(2)(C), is amply supported by the evidence that he held a civilian family hostage, that he used a hijacked van while its civilian driver was held captive, and that he was convicted of firearms violations and smuggling explosives, as well as the fact that he took part in the killing of a British Army officer.[18] In addition, respondent's admission of an active

[18] A finding of "serious reasons for considering" under this provision is essentially a finding of probable cause. *McMullen* v. *INS*, 788 F.2d 591, 598 n.2, 599 (9th Cir. 1986). A finding of probable cause is typically made without an adversary hearing. There is no reason why

role in the PIRA, which is classified as a terrorist organization by the United States, is sufficient to support the Attorney General's other determination, *i.e.*, that he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion." 8 U.S.C. 1253(h)(2)(A). See page 7, *supra*.

c. The court of appeals' second-guessing of the fully considered judgment of the Attorney General in his disposition of a matter that is so fully committed to his discretion should not be permitted to stand. Since the court of appeals has allowed respondent to avoid the consequences of his deliberate tactical choices, the result can only be to encourage manipulation of the adjudicatory process, delay final resolution of already-protracted deportation proceedings, and divert scarce administrative resources from more meritorious claims. When this procedural error is coupled with the court of appeals' fundamental error on the substantive standards governing asylum claims, review by this Court is plainly warranted.

the Attorney General may not draw on that familiar practice when considering the possible merit of a claim to withholding of deportation in the special setting of a motion to reopen a completed adjudication.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 662, 880, Dockets 88-4084, 89-4092

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Argued Jan. 19, 1990
Decided June 29, 1990

Before LUMBARD, FEINBERG, and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

Joseph Patrick Doherty, a member of the Provisional Irish Republican Army ("PIRA") who has been imprisoned in this country since 1983, petitions this court to review: (1) an order of former Attorney General Edwin Meese III, dated June 9, 1988, that rejected Doherty's designation of the Republic of Ireland as his country of deportation; and (2) an order of Attorney General Richard Thornburgh, dated June 30, 1989, that denied Doherty's motion to reopen his deportation proceedings for the purposes of applying for asylum and for withholding of deportation. For the reasons that follow, we affirm the order of Attorney General Meese, reverse the

order of Attorney General Thornburgh, and remand for further proceedings.

BACKGROUND

Doherty's status in this country has been the subject of sustained litigation since 1983, and so far has given rise to four published court opinions, *Doherty v. Meese,* 808 F.2d 938 (2d Cir.1986); *United States v. Doherty,* 786 F.2d 491 (2d Cir.1986); *United States v. Doherty,* 615 F.Supp. 755 (S.D.N.Y.1985); *Matter of Doherty,* 599 F.Supp. 270 (S.D.N.Y.1984), familiarity with which is assumed. Throughout all these proceedings, Doherty has been detained in the Metropolitan Correctional Center in Manhattan.

The events leading to Doherty's arrest in the United States stem from his involvement in the shooting death of a British army captain in Belfast, Northern Ireland. On May 2, 1980, Doherty and three other members of the PIRA set up an ambush in a private home in North Belfast as part of a plan to surprise and attack a convoy of British soldiers. After the men had waited three or four hours, a car pulled up in front of the house and five members of the British Army's Special Air Services emerged. In an ensuing gun battle, one of the British soldiers, Captain Herbert Westmacott, was shot and killed. Doherty was arrested, charged with murder, and put on trial in Belfast, Northern Ireland; but before the court had announced a decision, Doherty and seven others escaped from the maximum security Crumlin Road prison where they were being held. Two days later the court convinced Doherty *in absentia* of murder and a number of lesser crimes, and sentenced him to life imprisonment.

Doherty successfully eluded the British authorities. Aided by the PIRA, he fled to the Republic of Ireland

and, using an assumed identity, eventually made his way to New York City where he escaped detection for another sixteen months, until June 18, 1983, when he was arrested by agents of the Immigration and Naturalization Service ("INS") while working in a bar on the Upper East Side of Manhattan.

Immediately after Doherty's arrest in New York, the United States Attorney for the Southern District of New York, on behalf of the United Kingdom, filed a formal petition for his extradition. The case was referred to District Judge John E. Sprizzo, who elected to hear the matter as an "extradition magistrate" pursuant to 18 U.S.C. § 3184. At about the same time, the United States' initiation of deportation proceedings against Doherty prompted him to apply for asylum. At Doherty's request, the deportation proceeding and request for asylum were held in abeyance pending the outcome of the extradition action.

On December 12, 1984, Judge Sprizzo ruled that Doherty's crimes in Northern Ireland were "political offenses" within the meaning of the extradition treaty between the United States and the United Kingdom, and that Doherty's extradition was therefore barred. 599 F.Supp. 270; *see* Treaty of Extradition Between the United States and the United Kingdom of Great Britain and Northern Ireland, Art. V(1)(c)(i), 28 U.S.T. 227, T.I.A.S. No. 8468 (effective Jan. 21, 1977) (extradition shall not be granted for offenses "of a political character"). Based on the highly organized, quasi-military nature of the PIRA, its mode of discipline and internal command structure, as well as the historical context of Irish-British conflict and the fact that Doherty's acts of violence were directed at soldiers rather than civilians, Judge Sprizzo concluded that Doherty's involvement in the ambush and his subsequent escape from prison were of a political character. According to Judge Sprizzo, "the facts of this case present the assertion of the

political offense exception in its most classic form." 599 F.Supp. at 276.

Unable to appeal Judge Sprizzo's extradition decision directly, *see Matter of Mackin,* 668 F.2d 122 (2d Cir.1981) (denial of extradition not appealable), the United States sought collateral review of the order by way of a separate action for declaratory judgment. The district court dismissed that action for legal insufficiency, however, 615 F.Supp. 755, and we affirmed the dismissal. 786 F.2d 491.

With the extradition matter completed, the deportation proceeding against Doherty resumed in September 1986. At this point, Doherty decided to take advantage of a provision in the immigration statute that allows a deportable alien to select the country to which he will be deported. *See* Immigration and Nationality Act of 1952 ("INA" or "act") § 243(a), 8 U.S.C. § 1253(a). Doherty wanted to be sent to the Republic of Ireland, where he faced only a 10-year sentence of imprisonment rather than the life sentence awaiting him in Northern Ireland, and the Republic of Ireland had indicated its willingness to accept him. Therefore, at a hearing before Immigration Judge ("IJ") Howard I. Cohen, Doherty withdrew his application for asylum, conceded deportability, and designated the Republic of Ireland as his country of deportation.

The INS opposed Doherty's attempt to arrange deportation to the Republic of Ireland, claiming that it would be prejudicial to American interests not to return him to British authorities. Counsel for the INS stated that the case was of great concern "at the highest levels" of government. Despite the INS's objections, IJ Cohen ordered Doherty deported to the Republic of Ireland, as Doherty had requested, and the INS appealed immediately.

Four days after IJ Cohen's decision, Doherty petitioned for a writ of habeas corpus seeking immediate deportation

to the Republic of Ireland. Doherty claimed that the government was improperly detaining him during the administrative appeal of IJ Cohen's order solely to ensure that Doherty would be available for extradition under a newly signed treaty between the United States and the United Kingdom. The new treaty, which retroactively eliminated the political offense bar to extradition, had been ratified by the United States Senate but had not yet been acted upon by the British House of Commons. *See* 808 F.2d at 940.

The district court rejected Doherty's attempt to short-circuit the administrative process, however, and denied the petition. This court affirmed the decision of the district court, holding that the attorney general's appeal of IJ Cohen's order was reasonably grounded in his authority under § 243(a) of the act to deny deportation to an alien's designated country if, in the judgment of the attorney general, the deportation "would be prejudicial to the interests of the United States". 808 F.2d 938.

On March 11, 1987, the Board of Immigration Appeals ("BIA" or "board") decided the government's appeal but rejected its arguments and unanimously upheld IJ Cohen's order. The board stated that "we are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion." In a later decision, the board reopened the case to consider a motion by the government to introduce additional evidence concerning the prejudicial impact of deporting Doherty to the Republic of Ireland, but denied the motion after reopening, principally because it found that the additional evidence could have been presented at the hearing before IJ Cohen. At the request of the INS, the board then certified the case to Attorney General Meese pursuant to 8 C.F.R. § 3.1(h), a regulation that permits the attorney general to review

decisions of the board. Attorney General Meese accepted the case for review in October 1987.

On December 3, 1987, while the case was still pending before Attorney General Meese, Doherty moved before the board to reopen his deportation proceedings for the purposes of withdrawing his designation of the Republic of Ireland, redesignating the country of deportation, and submitting a new application for asylum and withholding of deportation. According to Doherty, this switch in his strategy was compelled by the implementation two days earlier of a new extradition treaty between the Republic of Ireland and the United Kingdom. Doherty feared that the new treaty, which altered the applicability of the "political offense" exception to extradition, would result in his certain extradition to the United Kingdom if he were deported to the Republic of Ireland, as he had originally requested. Without passing on its merits, the board referred Doherty's motion to reopen directly to Attorney General Meese.

In a decision dated June 9, 1988, Attorney General Meese rejected Doherty's designation of the Republic of Ireland as his country of deportation, holding under § 243(a) of the act that deportation there rather than to the United Kingdom would be prejudicial to United States' interests. He not only rejected Doherty's designation but also ordered him deported directly to the United Kingdom. The attorney general did not address the merits of Doherty's motion to reopen, however, but remanded that motion for consideration by the board.

The board granted Doherty's motion to reopen on November 14, 1988, in a 3-2 decision, holding that Doherty should be given the opportunity to apply for asylum and withholding of deportation. The board held:

> At the time of the hearing the reasonable expectation of the respondent was that he would be deported to Eire. The likelihood of his being deported to the United Kingdom appeared remote. * * * Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable.

The board further held that, like the change in Irish extradition law, the decision of Attorney General Meese represented a "changed circumstance[] which ha[s] arisen since the hearing". In addition, the board determined that Doherty had established a prima facie case for relief based on a well-founded fear of persecution in Northern Ireland. The board permitted reopening only for the purposes of applying for asylum and withholding and not for withdrawing his designation and redesignating the country of deportation.

At this point, the case was once again certified to the attorney general for review, again at the request of the INS. By order dated June 30, 1989, Attorney General Thornburgh "disapproved" the board's decision and denied Doherty's motion to reopen.

Doherty petitioned this court for review of both orders of the attorneys general. The petitions were consolidated for review, and we decide both here today.

DISCUSSION

A. Order of Attorney General Meese

Attorney General Meese determined that deporting Doherty to the Republic of Ireland would be prejudicial to United States' interests for two reasons: (1) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive swift and lawful punishment, and it is thus in the interests of the

United States that respondent serve his sentence in the United Kingdom"; and (2) "a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom." Doherty contends that Attorney General Meese abused his discretion in rejecting his deportation to the Republic of Ireland, an argument we find somewhat curious at this point since Doherty now, too, seeks to avoid deportation to that country. We find no merit to Doherty's claim in any event, and we affirm the order of Attorney General Meese.

Section 243(a) of the act grants a deportee the one-time right to select the country to which he will be deported, but it also gives the attorney general the authority to reject the selection if he determines that the deportation would be prejudicial to the interests of the United States:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, *in his discretion,* concludes that deportation to such country would be prejudicial to the interests of the United States.

INA § 243(a), 8 U.S.C. § 1253(a) (emphasis added).

As is apparent from the language of this provision, congress left the attorney general broad discretion to determine what constitutes prejudice to national interests. At an earlier stage of this case we noted that the statute provides no guidelines for determining what type of "prejudice" enables the attorney general to act; "[t]he requisite judgment requires an essentially political determination." 808 F.2d at 943. Thus the attorney general's finding of prejudice under § 243(a) "is essentially unreviewable" by a court. *Id.* at 944. We also stated that "[t]he implied corollary to the Attorney General's power to reject a designated country is the power to name the country to which the alien shall be deported." *Id.* at 941 (footnote omitted).

Attorney General Meese found that deporting Doherty to the Republic of Ireland, indeed to anywhere but the United Kingdom, would harm our relationship with the United Kingdom and would contradict our policy of punishing violence against democratic nations. Judgments of this nature are surely within the scope of the attorney general's discretion under § 243(a), and we are not permitted to second-guess them.

Doherty contends that the decision should nevertheless be overturned because of procedural error. He argues that the attorney general improperly relied on certain information, particularly an opinion letter from the Department of State, that was not in the record before the board. Although it might have been preferable if the attorney general had given Doherty an opportunity to comment on the letter, the letter itself did not reveal any new evidence against Doherty. It merely confirmed the attorney general's own conclusions about the foreign policy implications of the case. Moreover, the attorney general made it clear that his decision was based "on the facts established in the extradition proceedings" rather than on any evidence gleaned from extra-record sources. Therefore, this procedural error, if it was an error, was of no consequence to the outcome of the decision.

B. Order of Attorney General Thornburgh

Doherty moved to reopen his case in order to apply for asylum and for withholding of deportation, two separate forms of relief under the act. He also moved to reopen in order to withdraw his designation and redesignate the country of deportation, but the board did not permit, and Doherty does not here seek, reopening for these purposes. The right of asylum is established by § 208(a) of the act,

which authorizes the attorney general to grant asylum to an alien who demonstrates "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(a); *see I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). Asylum under § 208(a) is a broad form of relief, allowing the alien to remain in the United States where he can eventually apply for a lawful permanent residence. *See* 1 C. Gordon & S. Mailman, *Immigration Law & Procedure* §§ 1.03(6)(d)-(e) (1989).

Withholding of deportation is governed by § 243(h) of the act. Unlike asylum, which is discretionary, withholding of deportation is a mandatory remedy that prohibits the attorney general from deporting an alien to a country where there is a clear probability that his "life or freedom would be threatened" on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h); *I.N.S. v. Stevic,* 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984). Withholding of deportation under § 243(h) provides a more limited form of relief than asylum, however, barring deportation only to the nation where the alien faces persecution, but not to nonthreatening third countries.

If Doherty had pursued these claims at his original deportation hearing, there is little doubt that he would have been entitled to the evidentiary hearing he now seeks, because the right to apply for asylum or withholding of deportation carries with it the right to a hearing "where the likelihood of persecution can be fairly evaluated." *Augustin v. Sava,* 735 F.2d 32, 37 (2d Cir.1984); *see also Maldonado-Perez v. I.N.S.,* 865 F.2d 328, 332 (D.C.Cir.1989) (applicant for asylum "must be afforded an evidentiary hearing"). But, because Doherty had withdrawn his application for asylum in September 1986 as

part of his effort to arrange deportation to the Republic of Ireland, he can now have these claims heard only upon a reopening of his case. As the Supreme Court recently held, a motion to reopen for the purpose of applying for asylum and withholding of deportation may be denied for three independent reasons:

> First, [the BIA] may hold that the movant has not established a prima facie case for the underlying substantive relief sought. * * * Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence, or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially. * * * Third, in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.

I.N.S. v. Abudu, 485 U.S. 94, 104-105, 108 S.Ct. 904, 911-912, 99 L.Ed.2d 90 (1988) (citations omitted)

In rejecting Doherty's motion to reopen, Attorney General Thornburgh did not address the first ground for denial under *Abudu,* the sufficiency of the applicant's prima facie showing of persecution. Instead, applying the second ground for denial, the attorney general held that neither the change in Irish law nor the decision of Attorney General Meese represented a change in circumstances sufficient to justify the reopening. The attorney general relied on the third ground for denial as well, holding that Doherty "would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation." Finally, as an alternative basis for rejecting the

motion, the attorney general held that Doherty's withdrawal in September 1986 of his initial application for asylum constituted a "waiver" of his right to apply at a later time.

Reviewing Attorney General Thornburgh's decision within the *Abudu* framework, we conclude that in the singular circumstances of this case he abused his discretion in denying Doherty's motion to reopen.

1. *Prima Facie Case.*

Because he based his decision on other grounds, Attorney General Thornburgh held that "[i]t is unnecessary for me to address (and I do not) the question whether respondent has established a prima facie case for the substantive relief sought." Therefore, since the denial of a motion to reopen can be upheld only on the grounds set forth in the decision, *see Jen Hung Ng v. I.N.S.*, 804 F.2d 534, 538 (9th Cir.1986); *Mattis v. I.N.S.*, 774 F.2d 965, 967 (9th Cir.1985), we must assume for the purpose of this appeal that Doherty did meet his burden of demonstrating prima facie eligibility for relief, as the BIA found.

2. *New Evidence/Reasonable Explanation.*

The attorney general ruled that Doherty had failed to demonstrate a change in circumstances since his hearing that would justify reopening the case, because neither the change in Irish extradition law nor the decision of Attorney General Meese should have come as any surprise to Doherty. The attorney general emphasized that the diplomatic and parliamentary events that culminated in the new extradition treaty between the United Kingdom and the Republic of Ireland had been in progress for at least two years before actual implementation of the treaty on December 1, 1987. Rejection of Doherty's designation of the

Republic of Ireland was also foreseeable, according to Attorney General Thornburgh, because § 243(a) expressly authorizes such rejection, and because the INS had opposed Doherty's designation at the hearing. Thus, the attorney general concluded, the "new" circumstances offered in support of Doherty's motion to reopen were in fact entirely foreseeable at the time of the original hearing, and therefore did not provide a sufficient basis for granting the motion.

The flaw in the attorney general's approach to this issue is that it relies on a mistaken view of the law. Doherty was required to support his motion to reopen with "previously unavailable, material evidence", and a "reasonabl[e] expla[nation of] his failure to apply for asylum initially". *Abudu*, 485 U.S. at 104-05, 108 S.Ct. at 911. Neither the regulations nor the applicable decisional law require expressly or by implication that the new evidence be "unforeseeable"; indeed, such a rule would lead to absurd consequences. If a deportee were required to make his case not just on the state of facts and the law that existed at the time of the hearing, but instead on all "foreseeable" eventualities, there would be no end to the facts and issues potentially relevant to the case. Or, as the board in this case warned, "[i]f the respondent were expected to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum to [sic] any country to which he might remotely be deported, if he had a fear of returning there." *Matter of Doherty*, BIA File No. A26185231, at 6 (BIA Nov. 14, 1988).

We also have reason to doubt that the intervening circumstances, especially the decision of Attorney General Meese, were as "foreseeable" as the government suggests. Until this case, it appears that an alien's designation of a country of deportation had never been rejected by the

attorney general on the basis of prejudice to national interests after the designation had been approved by the board. His power to make such a decision is expressly conferred by the statute to be sure, but one could hardly say that its exercise in this case was "foreseeable" when it had never once, in over 30 years, been invoked.

The board was on target when it found that Doherty had a "reasonable expectation" of being returned to the Republic of Ireland at the time of his original deportation hearing. What possible reason could Doherty have had for withdrawing his application for asylum and conceding deportability if his prospects of returning to his chosen country were nonexistent? He certainly could not have been motivated by a desire to delay the proceedings, as is a tactic in some cases, because delay at that time was working decidedly against him. *See Doherty,* 808 F.2d at 940.

The board gave careful consideration to the new developments supporting Doherty's motion to reopen, and it was satisfied that he had met the "heavy burden" of presenting previously unavailable, material evidence, and of reasonably explaining his decision to withdraw the initial application for relief. The board repeatedly deals with motions to reopen, and has, no doubt, developed a body of informed experience that helps it distinguish meritorious motions from those lacking in merit. Indeed, it is precisely the knowledge gained through such experience that gives us reason to defer to the board's decisions in most immigration matters.

In sum, not only did the attorney general overturn the board's findings because of a different view of facts, but he did so under a "foreseeability" standard that has no legal foundation. This we believe constituted an abuse of his discretion. *Carcamo-Flores v. I.N.S.*,805 F.2d 60, 68 (2d Cir.1986) (denial of asylum reversed where decision "leaves at least room for significant doubt as to whether

the appropriate standard was applied"); *Gonzales Batoon v. I.N.S.*, 791 F.2d 681, 686 (9th Cir.1986) (denial of motion to reopen is abuse of discretion where board "misapplied the principles upon which it purported to act").

Doherty supported his motion to reopen with other "new evidence", not mentioned above, including the report of a human rights group discussing political persecution in Northern Ireland, and an affidavit from his mother describing the history of mistreatment that Doherty and his family have suffered at the hands of British authorities. However, because we find that the change in Irish extradition law and the decision of Attorney General Meese were alone sufficient to satisfy Doherty's burden of producing "new, material evidence" and a "reasonable explanation" of his decision to withdraw his original application, we need not resolve the question of whether this additional "new evidence" would also have been adequate for that purpose.

3. ***Ultimate Entitlement to Withholding of Deportation.***

As another ground for denying the motion to reopen, Attorney General Thornburgh held that Doherty "would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation." We first address Doherty's ultimate entitlement to withholding of deportation. According to the attorney general, Doherty was ineligible for that remedy because, under the statutory exceptions to withholding of deportation, "there are serious reasons for considering that [Doherty] has committed a serious nonpolitical crime outside of the United States", *see* I.N.A. § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C), and Doherty "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion". *See* I.N.A. § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A).

To begin with, the mandatory nature of the withholding remedy suggests that a determination of the applicant's ultimate entitlement to relief would be improper in the context of a motion to reopen. Unlike asylum, which is discretionary with the attorney general, withholding of deportation is mandatory upon a showing of statutory eligibility. If a person seeking to reopen his case establishes a prima facie case for withholding of deportation and introduces previously unavailable, material evidence, as Doherty has done, the attorney general simply has no discretion to decide that ultimately he would be "ineligible" for withholding of deportation, as that determination necessarily goes to the merits of the claim. As the Supreme Court stressed in *Abudu,* the attorney general's power to deny a motion to reopen based on factors other than the movant's failure to establish a prima facie case or the lack of new evidence is limited to "cases in which the ultimate grant of relief is discretionary * * * *not withholding of deportation*". 485 U.S. at 105, 108 S.Ct. at 912 (emphasis added); *see also Aviles-Torres v. I.N.S.,* 790 F.2d 1433, 1436 (9th Cir.1986) (abuse of discretion to deny motion to reopen where applicant established prima facie case for withholding of deportation); *Hernandez-Ortiz v. I.N.S.,* 777 F.2d 509, 518 (9th Cir.1985) (same); *cf. Motamedi v. I.N.S.,* 713 F.2d 575, 576 (10th Cir.1983) (abuse of discretion to deny motion to reopen where board "prejudg[ed] the merits of the case").

Considering the types of issues raised by Doherty's claim for withholding of deportation, the need for an evidentiary hearing should be obvious. His ultimate success or failure will depend on, among other factors, whether his crimes in Northern Ireland are judged "political" or "nonpolitical", and whether he "persecuted" others on account of their political views or was himself the victim of such persecution. Needless to say, these issues all raise

formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record. Examination of a fully developed record is a necessary precursor to the fair resolution of Doherty's claim, by an immigration judge, by the board, and, if it comes to it, by this court in another appeal. *Cf. Ananeh-Firempong v. I.N.S.,* 766 F.2d 621, 628-29 (1st Cir.1985) (questions as to whether mistreatment of applicant was "politically" motivated "are of a sort that are best considered at a hearing"). Thus, it was improper for the attorney general to prejudge the merits of Doherty's claim for withholding of deportation without the benefit of a record, and that claim must now proceed to a hearing.

4. *Ultimate Entitlement to Asylum.*

Whether Doherty's claim for asylum should also proceed to a hearing presents a more difficult question, because asylum, unlike withholding of deportation, is a discretionary remedy. As the Supreme Court held in *Abudu,* when an applicant seeks to reopen his case to file a claim for discretionary relief, such as a claim for asylum, the board (or, by implication, the attorney general) "may leap ahead, as it were, * * * and simply determine that * * * the movant would not be entitled to the discretionary grant of relief." 485 U.S. at 105, 108 S.Ct. at 912; *see also Cardoza-Fonseca,* 480 U.S. at 428 n. 5, 107 S.Ct. at 1211 n. 5 ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.*' ") (emphasis in original) (quoting *Stevic,* 467 U.S. at 423, 104 S.Ct. at 2497); *I.N.S. v. Rios-Pineda,* 471 U.S. 444, 449, 105 S.Ct. 2098, 2101-02, 85 L.Ed.2d 452

(1985) ("if the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met").

Nonetheless, it is a fundamental principle of our immigration law that the attorney general must base his discretionary decisions only on the "legitimate concerns" of the relevant statutory provision. *See Rios-Pineda,* 471 U.S. at 451-52, 105 S.Ct. at 2103; *Aviles-Torres,* 790 F.2d at 1437; *Mattis,* 774 F.2d at 968. Thus, the attorney general may abuse his discretion by acting arbitrarily, departing inexplicably from established policies, or discriminating invidiously against a particular group, *Rios-Pineda,* 471 U.S. at 451, 105 S.Ct. at 2103; *Bertrand v. Sava,* 684 F.2d 204, 212 (2d Cir.1982), or by giving effect to " 'considerations that Congress could not have intended to make relevant.' " *Wong Wing Hang v. I.N.S.,* 360 F.2d 715, 719 (2d Cir.1966) (quoting *United States ex rel. Kaloudis v. Shaughnessey,* 180 F.2d 489, 491 (2d Cir.1950) (L. Hand, J.)); *see also Jen Hung Ng,* 804 F.2d at 538 ("reliance by the BIA on improper factors in reaching a decision is an abuse of discretion that we are required to reverse").

The issue, then, is whether the attorney general based his discretionary decision on "legitimate concerns" of asylum. Despite the attorney general's broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests, our examination of the asylum statute convinces us that congress intended to prevent such factors from influencing asylum cases. In exercising his discretion in this case, Attorney General Thorburgh relied on just such improper factors. We therefore must reverse his order as to the asylum claim as well.

Examination of the history and purpose of the relevant legislation shows that congress intended to insulate the asylum process from the influences of politics and foreign policy, factors that had long dominated the refugee admissions process. Before World War II, the immigration law provided no right of asylum for aliens subject to persecution in their home countries. *See, e.g., United States ex rel. Giletti v. Commissioner of Immigration,* 35 F.2d 687 (2d Cir.1929) (deportation of Italian claiming persecution by fascist regime). With the passage of the Immigration and Nationality Act of 1952, Pub.L. No. 82-414, 66 Stat. 163, congress authorized the attorney general to "withhold" deportation of aliens from countries where, in his opinion, they would be subjected to physical persecution. 8 U.S.C. § 1253(h) (amended 1965, 1980). Unlike the current law, this older form of "withholding of deportation" was entirely discretionary, and it appears to have been rarely granted. *See* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952,* 1976 Wash. U.L.Q. 59, 100 (1976) (no published decisions in which relief had been granted under § 243(h)). The 1952 legislation also permitted the attorney general to admit persons "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest". 8 U.S.C. § 1182(d)(5)(A). This provision, known as "parole", was the primary vehicle for the admission of refugees before the 1980s, and it, too, was wholly discretionary with the attorney general.

In 1968, the United States became a party to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6257, 606 U.N.T.S. 268 ("protocol"). The protocol adopted the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 ("convention"), to which the United States had not ac-

ceded. Under the protocol and the convention, a person's status as a "refugee" was determined without regard to political considerations or the country from which the person fled. Instead, a "refugee" was defined as one who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality * * *.

Article 33 of the protocol prohibited the return of such a refugee to territories "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."

Congress initially believed that the protocol was basically consistent with existing law, and that any inconsistencies could be reconciled by the attorney general in the exercise of his discretion. *See Stevic,* 467 U.S. at 417-18, 104 S.Ct. at 2494-95. In the 1970s, however, there was a growing perception that discretionary relief from deportation was being granted in a manner that conflicted with the protocol. In particular, many observers believed that asylum determinations were still being affected by ideological and geographical considerations that tended to favor individuals fleeing from communist nations over those seeking refugee from countries having favorable political ties with the United States. *See, e.g.,* Hansen, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice,* 7 N.Y.U. Rev.L. & Soc. Change 107 (1978).

Amid growing dissatisfaction with the existing law, congress in 1980 comprehensively revised the standards and procedures governing asylum. *See* The Refugee Act of 1980, Pub.L. No. 96-212, 94 Stat. 102. This legislation replaced the attorney general's ad hoc parole authority with a systematic procedure for adjudicating asylum

claims that was intended to eliminate geographical and ideological factors from consideration. *See Stevic,* 467 U.S. at 425-27, 104 S.Ct. at 2498-500; S.Rep. No. 96-256, 96th Cong., 2nd Sess. 1 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141; Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L.Rev. 9,.36 (1981). The statute accomplished this goal by linking eligibility for asylum to the politically neutral definition of "refugee" set forth in the protocol. *See Cardoza-Fonseca,* 480 U.S. at 436, 107 S.Ct. at 1216.

Thus, in passing the Refugee Act of 1980, congress responded to the problems created by the attorney general's theretofore unlimited discretion over the admission of refugees. By defining eligibility in politically neutral terms, congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum. To use Judge Learned Hand's terminology, these were "considerations that Congress could not have intended to make relevant" to asylum. *Shaughnessey,* 180 F.2d at 491.

The more limited nature of the attorney general's discretion in asylum cases can be illustrated by comparing it with his authority to grant suspension of deportation, INA § 244, 8 U.S.C. § 1254, and adjustment of status, INA § 245, 8 U.S.C. § 1255, the two major forms of "discretionary" relief from deportation other than asylum. With the adoption of immigration quotas and the elimination of the statute of limitations on deportation in the 1920s, deportation in some cases was seen to create unnecessary hardships, "[f]or there were may aliens whose residence in the United States was irregular but who had become worthy members of their communities and had established strong ties here." 3 C. Gordon & S. Mailman, *supra,* § 7.1(a).

To help mitigate the harshness of mandatory deportation, the attorney general was given the authority to suspend the deportation of aliens who had resided in the United States for at least seven years and could demonstrate "extreme hardship" if returned to their own country, INA § 244(a), 8 U.S.C. § 1254(a), especially where the hardship was the result of separation from family members legitimately living in the United States. *E.g., Carrete-Michel v. I.N.S.,* 749 F.2d 490, 494 (8th Cir.1984). For similar reasons, the attorney general was given the power to grant an "adjustment of status" to eligible aliens, and here, too, factors such as family ties and length of residence were critical. *E.g., Patel v. I.N.S.,* 738 F.2d 239, 243 (7th Cir.1984); *Jain v. I.N.S.,* 612 F.2d 683, 687-88 (2d Cir.1979), *cert. denied,* 446 U.S. 937, 100 S.Ct. 2155, 64 L.Ed.2d 789 (1980).

The statute itself does not set forth the factors to be weighed by the attorney general in suspending deportation or adjusting an alien's status. Both remedies "leave substantial room for the Attorney General to define the substantive grounds for relief." *LeBlanc v I.N.S.,* 715 F.2d 685, 690 (1st Cir.1983); *see also Hernandez-Patino v. I.N.S.,* 831 F.2d 750, 753 (7th Cir.1987) ("Congress, in refusing to define "extreme' hardship fully, avoided the substantive policy decision and has deferred to agency expertise.").

In asylum cases, by significant contrast, the substantive grounds for discretionary relief were not left to be determined by the attorney general. Indeed, one of the motivating forces behind passage of the Refugee Act was the "felt need to structure and control executive decisionmaking" in refugee matters. Anker & Posner, *supra,* at 36. Unlike the provisions for suspension of deportation and adjustment of status, the Refugee Act defines with specificity the category of aliens who should ordinarily be granted asylum,

and it provides concrete guidance as to those who should not. Moreover, while the presence of family members in the United States may work in favor of a potential asylee, *see* Helton, *The Proper Role of Discretion in Political Asylum Determinations,* 22 San Diego L.Rev. 999, 1015-18 (1985), keeping family members together is not an essential concern of asylum. In many cases, an applicant may be leaving family behind to escape persecution.

Consequently, the attorney general's broad "discretion" to grant suspension of deportation or adjustment of status does not necessarily provide a useful guide to the scope of his "discretion" to grant asylum. Even the attorney general himself acknowledged the unique characteristics of asylum in saying "that the decision to grant asylum to an alien is inherently a humanitarian act by the United States that is distinct from the normal operation and administration of the immigration laws." United States Department of Justice, Press Release (April 7, 1987) (announcing formation of Asylum Policy and Review Unit within the Department of Justice), *quoted in* Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System,* 15 Hofstra L.Rev. 79, 85 (1986).

Why, then, if congress intended to curtail the attorney general's authority over the asylum process, did it make asylum a discretionary remedy rather than a mandatory form of relief? The answer to this question becomes evident when we consider the drafting of the Refugee Act and the adminstrative practice since its enactment. The senate bill, as reported out of the Senate Judiciary Committee, originally made the grant of asylum mandatory upon an appropriate showing of persecution. S.Rep. No. 96-256, 96th Cong., 2nd Sess. 8-9 (1979). The house version of the provision, the one ultimately adopted in the conference report, vested the attorney general with the discretionary

authority he now possesses. The house report emphasized, however, that "[t]he Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law. * * * The Committee intends to monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect". H.R.Rep. No. 96-608, 96th Cong., 2nd Sess. 17-18 (1979); *see generally* Anker & Posner, *supra,* at 43-64.

Although there is some ambiguity here, it is apparent that congress did not intend to give the attorney general boundless "discretion" to make asylum decisions, for that would surely have frustrated the primary goals of the Refugee Act. Instead, as the house report suggests, congress merely desired to preserve some degree of flexibility in the administration of the asylum process in the context of a larger refugee program that involves, among other things, procedures for the admission of applicants at American offices overseas. In view of the inherent problems of running such a large and complex program, it is conceivable that a person who might otherwise qualify for asylum should be denied relief because, for example, he had a previous offer to settle in a nonthreatening third county, or had intentionally circumvented the admissions process available in his home country in order to achieve more immediate entry into the United States.

A decade of practice confirms that the board's discretionary denials of asylum to otherwise eligible candidates have been primarily for reasons of administrative fairness and efficiency, not to preserve our political relationship with the allegedly persecuting nation. Two types of cases have been the primary subjects of such denials. The first involves situations in which applicants have abused the asylum process by fraudulently circumventing

the overseas admissions process without sufficient cause. *See Sarkis v. Sava,* 599 F.Supp. 724, 755 (E.D.N.Y.1984); *Matter of Gharadaghi,* Interim Dec. No. 3001 (BIA Nov. 1, 1985); *Matter of Shirdel,* Interim Dec. No. 2958 (BIA Feb. 21, 1984); *Matter of Salim,* 18 I. & N. Dec. 311 (BIA 1982). Even here, however, the board has emphasized that abusing the admissions process "is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case. * * * [T]he danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula,* Interim Dec. No. 3033 (BIA Sept. 22, 1987). The second type of discretionary denial involves refugees who have found a safe haven in another country before entering the United States. *See* Helton, *supra,* at 1007 & n. 49 (citing unpublished BIA decisions).

In summary, the history of the Refugee Act, its purpose, and the context within which it was enacted, all show that congress intended the attorney general to exercise a more limited role in asylum cases as compared with his role in other types of discretionary immigration matters. As demonstrated by the administrative practice before the board, this limited discretion has not been used to implement the government's foreign policy objectives, something that would clearly violate the spirit, if not the letter, of the Refugee Act, but rather to deter abuses of the refugee system, and to deny relief to aliens who have found safety elsewhere.

Reviewing Attorney General Thornburgh's decision in light of the above, we conclude that he based his decision in large part on the types of geopolitical concerns that congress intended to eliminate from asylum cases. The attorney general held that he would deny asylum for the following reasons:

First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." * * * Deporting respondent to the United Kingdom would unquestionably advance this important policy. * * * Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. * * * Third, respondent knowingly and intentionally waived his claim to asylum, and for the reasons explained in Part IV, *supra,* I would not permit withdrawal of that waiver. Fourth, I believe that respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general * * * suggest that he is not deserving of equitable relief.

Decision of Attorney General Thornburgh at 28 (June 30, 1989) (citations omitted).

The first two reasons given by Attorney General Thornburgh simply restate the foreign policy concerns identified by Attorney General Meese when he barred Doherty's return to the Republic of Ireland. While such considerations were clearly relevant in that context, as indicated by the statutory standard of "prejudicial to the interests of the United States", INA § 243(a), 8 U.S.C. § 1253(a), congress did not intend the same factors to influence asylum decisions. In giving effect to these considerations, the attorney general seriously exceeded his discretion. The attorney general's third rationale, that Doherty "waived" his claim to asylum, is also improper, for the reasons explained below in part B.5 of this opinion. As for the attorney general's final reason, it not only assumes facts that would be more properly determined at a hearing, it also

depends in large measure on Doherty's "membership" in the PRIA, one of the very bases for which he claims persecution. In short, Attorney General Thornburgh exercised his discretion in denying Doherty's application for reasons that congress sought to eliminate from asylum cases, and, in doing so, he abused his discretion.

5. *Waiver.*

Finally, as an independent ground for denying the motion to reopen, Attorney General Thornburgh ruled that Doherty had "waived" his right to apply for relief. According to the attorney general, when Doherty conceded deportability to the Republic of Ireland and withdrew his initial application for asylum in September 1986, he "assumed the risk" that the Republic of Ireland might change its extradition law and that his designation of the Republic of Ireland might be rejected by Attorney General Meese. As Attorney General Thornburgh put it,

> [T]he integrity of the administrative process dictates that a deportee who, with the advice and assistance of counsel, makes such deliberate tactical decisions, not be permitted to disown those decisions merely because they ultimately result in action adverse to his interests. This is especially the case where the possibility of that action was not only foreseeable but foreseen.

The attorney general's reasoning is incompatible with any motion to reopen, however. If parties to a deportation hearing were held to "assume the risk" that subsequent developments might change the basis for the board's decision, no case would ever be reopened. For example, an alien could not reopen a case to introduce new evidence that after a change in leadership he would be persecuted in a country that had previously appeared nonthreatening. He would have "assumed the risk" that such events might transpire.

Moreover, we find the government's professed concern for the "integrity of the administrative process" unconvincing in light of its own actions in this case. The government's use of administrative and judicial processes has been exhaustive, to say the least. Its efforts have included, in Judge Friendly's words, an extended attempt "to escape from the longheld principle that when an extradition magistrate * * * refuses to certify a person sought to be extradited under an extradition treaty, the Government's sole recourse is to submit a request to another extradition magistrate." *United States v. Doherty,* 786 F.2d at 492-93. In addition, the government itself moved to reopen the case at an earlier stage of the administrative proceedings, even though its substantive motion was denied upon reopening. Finally, the certification procedure itself, a rarely used procedural device that is removed from normal administrative channels, has twice been invoked by the attorney general with respect to Doherty.

In short, it would be unfair to deny a motion to reopen for what amounts to a dubious procedural argument where the alien has otherwise satisfied the standards for reopening and where the government's own conduct in the case has demonstrated less-than-perfect adherence to procedural formalities. The "sporting theory of justice" has no place in deportation proceedings. *Matter of Martinez-Solis,* 14 I. & N. Dec. 93, 95 (BIA 1972).

CONCLUSION

The order of former Attorney General Meese is affirmed insofar as it rejected Doherty's designation of the Republic of Ireland as the country to which he would be deported and ordered him deported directly to the United Kingdom. The order of Attorney General Thornburgh denying Doherty's motion to reopen is reversed and the

case is remanded to the board for further proceedings consistent with this opinion.

LUMBARD, Circuit Judge, concurring in part and dissenting in part:

After seven years of proceedings before the immigration authorities, the Attorney General has decided that Doherty, who has admitted his deportability after illegal entry into the United States, may not reopen the matter and be heard on his claims for asylum as a political refugee and for withholding of deportation. The record supports the Attorney General's exercise of his discretion in denying further hearing. It also supports his decision that "[i]t is in the [United States'] interest that [Doherty] be sent directly to the United Kingdom," which he left as a fugitive from justice, and not to the Republic of Ireland. Consequently, I would affirm both orders of the Attorneys General.

On June 10, 1981, Doherty escaped from the Crumlin Road prison in Northern Ireland where he was being held during his trial for the killing of Captain Herbert Westmacott of the British Army on May 2, 1980. Two days after his escape, he was convicted for the murder and sentenced to life imprisonment. A fugitive from justice, he entered the United States illegally on or about February 1, 1982 and was arrested in New York City on June 18, 1983. At about the same time that a deportation warrant was filed against him, Doherty filed for asylum and withholding of deportation on June 28, 1983.

Having been thwarted in returning Doherty to the United Kingdom under the extradition treaty then in force, by a ruling of the District Court for the Southern District in December 1984 which under longstanding case-law was not appealable, the Government sought to expel him as an illegal immigrant and return him to the country from which he had fled.

In a strategic maneuver undertaken with advice of counsel, Doherty conceded deportability on September 5, 1986 and withdrew his applications for asylum and withholding of deportation. On September 12, 1986, the Immigration and Naturalization Service, which executes the immigration laws under the supervision of the Attorney General, requested the Immigration Judge ("IJ") to deport Doherty to the United Kingdom. Nonetheless, the IJ decided that Doherty should be returned to the Republic of Ireland. After the Board of Immigration Appeals ("Board" or "BIA") upheld the IJ, Attorney General Meese on June 9, 1988 decided in the best interests of the foreign relations of the United States that Doherty should be returned to the United Kingdom rather than to the Republic of Ireland.

Meanwhile, on December 3, 1987, Doherty moved for leave to reopen the deportation proceedings to reapply for asylum and withholding of deportation in view of what he claimed were changed circumstances. The Board, on November 14, 1988, voting 3-2, granted leave to reopen.

Attorney General Thornburgh on June 30, 1989 overruled the Board and denied leave to reopen. In a carefully reasoned opinion, he held that even if Doherty were permitted to reopen the deportation proceedings, he would be denied asylum—a form of discretionary relief—because his violent acts rendered him ineligible for a favorable exercise of discretion. This opinion demonstrates conclusively that Doherty has shown no new facts which are relevant to the Attorney General's decision to return him to the United Kingdom.

Doherty has enjoyed in full measure any right he has to a full and extended consideration of his claims. The Attorney General is the final authority on the return of illegal aliens. We should sustain his authority especially in matters which so intimately affect the foreign relations of the United States. The Attorney General's opinion shows that, whatever else may be done, the inevitable result is that Doherty will be sent back to the United Kingdom.

I

In *Doherty v. Meese*, 808 F.2d 938, 943-44 (2d Cir. 1986),[1] we held that, in immigration cases with weighty foreign policy implications, a decision of the Attorney General is "essentially unreviewable" when Congress has committed that decision to the unguided discretion of the Attorney General. Judicial inquiry in such cases is effectively limited to claims of unconstitutionality, fraud, or lack of jurisdiction, *id.* at 944 (citations omitted), and this case presents no colorable claims of that nature. Thus, we held then that the decision whether to reject an alien's designation of the country to which he will be deported ("designation") under § 243(a) of the Immigration and Nationality Act ("Act" or "INA") is "essentially unreviewable" because the statute provides that such a decision is simply in the Attorney General's "discretion." 8 U.S.C. § 1253(a).

We now review a decision denying a motion to reopen deportation proceedings. Like the matter of designation, motions to reopen are committed to the discretion of the Attorney General. In numerous cases, the Supreme Court

[1] There, Doherty petitioned for habeas corpus relief from his detention pending the Government's administrative appeal of the IJ's decision granting Doherty's request to be deported to the Republic of Ireland rather than to the United Kingdom. Doherty contended that the Government's appeal was frivolous and was intended solely to keep him in the United States until after the effective date of the Supplementary Extradition Treaty between the United States and the United Kingdom. *See Doherty v. Meese*, 808 F.2d at 940. We affirmed the district court's denial of habeas relief because the Government clearly had a reasonable basis for pursuing the administrative appeal.

has held that such motions are discretionary in the Board. *See, e.g., INS v. Rios-Pineda,* 471 U.S. 444, 449, 105 S.Ct. 2098, 2101-02, 85 L.Ed.2d 452 (1985); *INS v. Phinpathya,* 464 U.S. 183, 188 n. 6, 104 S.Ct. 584, 588 n. 6, 78 L.Ed.2d 401 (1984); *INS v. Jong Ha Wang,* 450 U.S. 139, 144 n. 5, 101 S.Ct. 1027, 1031 n. 5, 67 L.Ed.2d 123 (1981). Because the Board "is not a statutory body, but is wholly a creature of regulations issued by the Attorney General," *Greene v. INS,* 313 F.2d 148, 151 (9th Cir.) (citing 8 C.F.R. §§ 3.1 *et seq.*), *cert. denied,* 374 U.S. 828, 83 S.Ct. 1869, 10 L.Ed.2d 1051 (1963), the only source of the Board's discretion is the Attorney General. Furthermore, the Attorney General always has authority to review a decision of the Board, *see* 8 C.F.R. § 3.1(h)(1). Thus, because the Board has discretion in this area, the Attorney General *a fortiori* has discretion at least as broad.[2]

Since we affirm Attorney General Meese's discretionary rejection of Doherty's designation because it is "essentially unreviewable," and since Attorney General Thornburgh's discretionary decision not to reopen proceedings is likewise "essentially unreviewable," we should also affirm the Thornburgh order. We had no basis for reversing the Attorney General in *Doherty v. Meese,* and we have none now.

Motions to reopen "are disfavored in deportation proceedings" for the same reason that petitions for rehearing and motions for new trials based on newly discovered evi-

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[2] The Attorney General's discretionary authority to decide or even to countenance motions to reopen derives from those portions of the Act providing that "[t]he Attorney General shall be charged with the administration and enforcement of" the Act and "shall . . . perform such other acts as he deems necessary for carrying out his authority under the provisions of" the Act. INA § 103(a), 8 U.S.C. § 1103(a). This language places no constraints on the decisionmaking authority that it confers upon the Attorney General.

dence are disfavored: "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu,* 485 U.S. 94, 107, 108 S.Ct. 904, 913, 99 L.Ed.2d 90 (1988). Doherty has had seven years to develop and present his case yet he has failed to convince the Attorney General. When the Attorney General decides, after a careful review of the voluminous record, that a drawn-out case such as this no longer merits attention, we are in no position to contradict that judgment.

There is a special reason for judicial restraint in cases such as this. As compared with officials of other administrative agencies, "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context." *Abudu,* 485 U.S. at 110, 108 S.Ct. at 914-15 (footnote omitted). There can be no doubt that political judgments are at the heart of the decision not to reopen this case. As we stated in *Doherty v. Meese,* the Doherty matter "affects not only the relations of the United States with the United Kingdom and the Republic of Ireland, but also the complicated mutlilateral negotiations concerning efforts to halt international terrorism." 808 F.2d at 943. To prolong these proceedings after the Attorney General has drawn the line is to upset a policy decision that affects international relations and that accordingly should be " 'largely immune from judicial inquiry or interference,' " *id.* (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 589, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952)).

The denial of Doherty's motion to reopen was made not by an inferior INS official but by the Attorney General

himself in a thorough and reasoned signed opinion. The Attorney General, as a member of the Cabinet who reports to the President and is conversant with the views of the administration, expresses the views of the Government. When the Attorney General makes a judgment on an essentially political question, we usurp the executive's authority when we review that decision for infirmities less grave than the most serious violations of law. *See Doherty v. Meese,* 808 F.2d at 944.

The majority states that the Board has "developed a well of informed experience" concerning motions to reopen and that "it is precisely the knowledge gained through such experience that gives us reason to defer to the Board's decisions in most immigration matters." Thus, the majority implicitly concludes, the Board's decision here deserves more deference than Attorney General Thornburgh's decision disapproving it. I cannot accept this conclusion. Matters which concern asylum and deportation are primarily matters of foreign policy and political judgment. The Attorney General has the ultimate authority in such matters, not the members of an inferior Board. Congress has placed the Attorney General at the top of the hierarchy of immigration officials; his word is the last word.

INS v. Abudu, 485 U.S. 94, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988), should not be the sole focus of our inquiry because it addresses few of the foregoing concerns. In large part, *Abudu* simply summarized prior holdings regarding some of the grounds upon which the Board may deny a motion to reopen and held that the Board's denial of a motion to reopen under 8 C.F.R. § 3.2 or 208.11 should be reviewed under an abuse-of-discretion standard. Since *Abudu* involved a decision of the Board and not of the Attorney General himself, it provides little guidance for our review of the extraordinary case where, as here, the Attorney General has deemed certain principles and policies – for

example, that those who use violence to advance parochial ends are not to benefit from the privileges offered by our immigration law – so important that he has used his rarely exercised authority under 8 C.F.R. § 3.1(h)(1) to articulate and apply them. By dwelling on the reasons set forth in *Abudu* for denying a motion to reopen, the majority gives insufficient attention to the unusual posture of this case. Moreover, *Abudu* is not the last word on motions to reopen because the *Abudu* list of reasons for denying a motion to reopen was clearly not meant to be exhaustive. *See* 485 U.S. at 104, 108 S.Ct. at 911 ("There are *at least* three independent grounds on which the BIA may deny a motion to reopen.") (emphasis added).

II

Even under *Abudu,* the motion to reopen was properly denied for three reasons.

First, to the extent that the motion to reopen was for the purpose of applying for asylum, it was properly denied under the third *Abudu* factor, which provides that where a party moves to reopen to apply for discretionary relief, such as asylum,

> the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.

Abudu, 485 U.S. at 105, 108 S.Ct. at 912.

If the BIA may simply deny the motion because it believes the movant is undeserving of asylum, then surely the Attorney General may do the same. Here, Attorney General Thornburgh did just that with the following statement:

> In my discretion, I would not grant [Doherty] asylum. [I]t is the "policy of the United States that those who

> commit acts of violence against a democratic state should receive prompt and lawful punishment." *Matter of Doherty*, Mem. Att'y Gen. at 7 (June 9, 1988). Deporting [Doherty] to the United Kingdom would unquestionably advance this important policy. *See id.* at 6-7. [In addition,] the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. *Id.* at 7-8.

In so ruling, the Attorney General did not abuse his discretion.

The majority, disregarding the delicacy of this determination, notes that Attorney General Thornburgh, in ruling that Doherty ultimately would not be granted asylum, referred to the nation's political and foreign policy interests. According to the majority, such a reference was an abuse of discretion because the legislative history of the asylum provision supposedly indicates that Congress intended such interests to be ignored in the determination of whether to grant an asylum application. My reading of the legislative history, even accepting the majority's historiography, leads me to a different conclusion. Even if the asylum provision does define eligibility for asylum, it explicitly commits the asylum determination to the discretion of the Attorney General. Congress specifically rejected making asylum mandatory upon the appropriate showing. If Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so. That the statute places no restrictions on his discretion tells us that Congress intended that there be none.

Moreover, a comparison of the two provisions indicates that the Attorney General has no less discretion in deciding asylum cases then he does in deciding where to deport an alien. The deportation provision states:

> "The deportation of an alien . . . shall be directed by the Attorney General to a country promptly designated by the alien . . . unless the Attorney General, *in his discretion,* concludes that deportation to such country would be prejudicial to the interests of the United States."

INA § 243(a), 8 U.S.C. § 1253(a) (emphasis added). Similarly, the asylum provision states:

> [T]he alien may be granted asylum *in the discretion of the Attorney General* if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

INA § 208(a), 8 U.S.C. § 1158(a) (emphasis added). To judge from these two subsections, the Attorney General has wider latitude to reject an asylum application than a deportation designation because the asylum applicant may not even be considered for discretionary approval unless the Attorney General also determines that the applicant is a refugee. Thus, as I have shown with respect to the Attorney General's discretion to deny a motion to reopen, if a discretionary decision under the deportation provision is essentially unreviewable, then a discretionary decision under the asylum provision should also be essentially unreviewable.

There is no basis in the statute for concluding that, once an alien is determined to be eligible for asylum, the Attorney General's discretion to deny asylum is limited to a narrow class of cases involving administrative irregularity.[3]

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[3] Doherty even fits into this category. The majority concedes that an asylum application may be denied when the applicant "intentionally circumvents the admissions process" in his home country to secure more speedy entry into the United States. This is essentially to say that

While Congress has established rules for determining who is eligible for asylum, it has created no rules for determining who among those eligible for asylum should receive that relief. The statute, in providing that "[t]he alien may be granted asylum *in the discretion of the Attorney General,*" INA § 208(a), 8 U.S.C. § 1158(a) (emphasis added), uses the broadest language possible to describe the authority of the Attorney General to make the ultimate asylum decision. Moreover, if, as the majority states, those eligible for asylum "should ordinarily be granted asylum," then the statute's provision that the ultimate asylum decision is "in the discretion of the Attorney General" would be surplusage; such a view would render meaningless this most significant portion of the statute when a much more plausible interpretation—that Congress declined to guide the Attorney General's decision as to who among those eligible should receive asylum—is available.

Second, again to the extent that the motion to reopen was for the purpose of applying for asylum, it was properly denied under that part of the second *Abudu* factor which permits denial of a motion to reopen "in an asylum application case [if] the movant has not reasonably explained his failure to apply for asylum initially." 485 U.S. at 105, 108 S.Ct. at 911. In deciding, properly, that Doherty waived his claim to asylum as a result of a tactical choice, Attorney General Thornburgh effectively ruled

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an applicant's manipulation of the process for personal benefit is grounds for rejection. Here, Attorney General Thornburgh implicitly decided that by withdrawing his application for asylum, conceding deportability, and then renewing the application when his plan backfired, Doherty was seeking to manipulate the process in a way that made him undeserving of asylum. Certainly the Attorney General may decide, first, that Doherty's rejection of asylum in a tactical maneuver and his subsequent renewal of his asylum application represent an attempt to have it both ways and, second, that the Government need not grant asylum to one who plays fast and loose with so great a privilege as asylum in the United States.

that Doherty failed this prong of *Abudu*.[4] Doherty's decision to withdraw his asylum application, which is the equivalent of a "failure to apply for asylum initially," was made with advice of counsel and with full knowledge that the Government was going to contest his designation and that the statute authorized Attorney General Meese to reject it.[5] It was a calculated risk on his part to admit deportability and not to pursue relief: his strategy was to be deported before the effective date of the Supplementary Treaty. Doherty asked to be deported knowing full well that such a procedural ploy might work to his disadvantage. Now that it has in fact worked to his disadvantage, he asks this court for a second bite at the apple for the obvious reason that he does not like the way his first plan worked out. Surely his miscalculation is not sufficient explanation of his failure to apply for asylum initially.

Attorney General Thornburgh points out that Doherty, having conceded deportability and failed to pursue an application for asylum or withholding, is in a position analogous to that of a defendant seeking to withdraw a guilty plea. One in such a position bears an extremely heavy burden of proof on a narrow issue: "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying

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[4] Although Attorney General Thornburgh termed this waiver argument an "independent" ground for decision, it is the equivalent of a challenge, under the second *Abudu* factor, to the reasonableness of Doherty's explanation of his failure to apply for asylum initially.

[5] He must be charged with knowing that there was a substantial risk Attorney General Meese would reject his designation. The same sentence of the INA that gives the alien the right to designate gives the Attorney General the right to reject the designation. In addition, the Government's position stated in open court on September 12, 1986, when Doherty conceded deportability and designated the Republic of Ireland, and maintained ever since is that it would contest Doherty's designation.

plea was both counseled and voluntary." *United States v. Broce,* 488 U.S. 563, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989). Doherty makes no claim that his decision not to pursue asylum was either uncounseled or involuntary. Moreover, "[a] defendant is not entitled to withdraw his plea [of guilt] merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Brady v. United States,* 397 U.S. 742, 757, 90 S.Ct. 1463, 1473, 25 L.Ed.2d 747 (1970). That Doherty misapprehended the relative merits of the various options open to him, which is what his claims boil down to, is simply a statement that he failed to apply for asylum and not a reasonable explanation for that failure.

The majority miscasts Attorney General Thornburgh's waiver argument as a claim that a party to a deportation proceeding assumes the risk "that subsequent developments might change the basis for the Board's decision." Attorney General Thornburgh did not make so nebulous and sweeping a claim. He spoke only of those subsequent developments—Attorney General Meese's rejection of his designation and his potential extradition from the Republic of Ireland to the United Kingdom—which Doherty knew or should have known had a strong likelihood of coming to pass and for which Doherty's mere distate is insufficient reason to excuse his unsuccessful strategem.

Third, the entire motion to reopen was properly denied under that part of the second *Abudu* factor which permits denial of a motion to reopen if "the movant has not introduced previously unavailable, material evidence." 485 U.S. at 104, 108 S.Ct. at 911 (citation omitted). The record fully supports Attorney General Thornburgh's decision that Doherty did not offer any previously unavailable, material evidence. The decision of Attorney General Meese to reject Doherty's designation and to deport Doherty to the United Kingdom was simply not

evidence. It was a legal consequence. Doherty's argument here is akin to that of one who moves to withdraw a guilty plea because the sentence, or even prison itself, has proved harsher than expected. Such withdrawal is impermissible. *See United States v. Prince,* 533 F.2d 205 (5th Cir. 1976) (defendant may not withdraw plea of *nolo contendere,* made after consulting counsel, when sentence proved harsher than expected). As Attorney General Thornburgh stated, "The ultimate decision in an administrative process cannot itself constitute 'new' evidence to justify reopening. If an adverse decision were sufficient, there could never be finality in the process."

Nor did implementation of the Extradition Act on December 1, 1987 constitute new evidence. Attorney General Thornburgh found that Doherty was extraditable from the Republic of Ireland to the United Kingdom even prior to December 1, 1987 on the basis of long-standing provisions of Irish law, and I see no reason to disturb this finding. The Extradition Act is simply cumulative evidence—if it is evidence at all—of his extraditability to the United Kingdom. As Attorney General Thornburgh noted, one of Doherty's arguments in support of the immigration judge's decision to deport him to the Republic of Ireland was that Irish law prior to the Extradition Act also provided for his extradition to the United Kingdom. Thus, the fact of his extraditability from the Republic of Ireland to the United Kingdom did not newly arise on December 1, 1987 but rather existed long before that date.

I also agree with the Attorney General that the additional documents, books, and affidavit in support of his motion to reopen were either cumulative, previously available, or immaterial. As the Attorney General stated, "None of the evidence supports the existence of a threat of persecution of which respondent was unaware or a material change in the character of a threat previously recognized."

III

To the extent the motion to reopen was for the purpose of applying for withholding of deportation, it was properly denied for two additional reasons.

In ruling that Doherty waived any claim he may have had to asylum, Attorney General Thornburgh also ruled that Doherty waived whatever claim he had to withholding of deportation. For the reasons stated above in Part II, this was a sufficient independent ground for his denial of the motion to reopen.

The motion to reopen was also properly denied under INA § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C), which provides that an alien "shall not" be granted withholding

> if the Attorney General determines that—
>
> * * * * *
>
> (C) there are serious reasons for considering that the alien has commited a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States. . . .

As is evident from the face of the statute, the majority's statement that "withholding of deportation is mandatory upon a showing of statutory eligibility" tells only half the story. In fact, it is mandatory for the Attorney General to *deny* withholding if *he* determines that the alien fails any of the tests in § 243(h)(2)(A)-(D). Although the Attorney General's determination is not discretionary, § 243(h)(2) states numerous reasons to deny withholding, and subsection (C) has a low burden of proof, *see McMullen v. INS*, 788 F.2d 591, 599 (9th Cir.1986) (only "probable cause" required). Thus, I believe that as long as the record is adequate and the Attorney General makes reasoned findings based on that record, his determination that the alien has failed any of the tests of § 243(h)(2), particularly that in subsection (C), should be a sufficient ground to deny a motion to reopen for the purpose of applying for withholding. Since the record is replete with Doherty's admissions of actions constituting violations of § 243(h)(2), and since the Attorney General's determination that Doherty failed the test in subsection (C) is a model of a reasoned decision based on the record, I think he properly denied the motion to reopen to the extent it was for the purpose of applying for withholding.[6]

Doherty admitted to all of the following at his 1984 extradition hearing. He was an officer in the Provisional Irish Republican Army ("PIRA") and committed acts dangerous to others on behalf of the PIRA,[7] which the United States Department of State has classified as a terrorist organization, *see* n. 6, *supra*. For example, in 1973, Doherty was convicted of and imprisoned for a firearms violation. In 1974, he was convicted of and imprisoned for smuggling 80

[6] Although Attorney General Thornburgh found that Doherty failed the test in subsection (A) as well, I focus on his decision under (C), as the facts relevant to that subsection are particularly compelling. However, I find his conclusion under (A) perfectly acceptable as well. Subsection (A) prohibits the Attorney General from granting withholding to any alien he determines to have "ordered, incited, assisted, *or otherwise participated in* the persecution of any person on account of . . . political opinion." § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A) (emphasis added). Doherty does not dispute that the official position of the United States is that the PIRA is a terrorist organization, *see* U.S. Department of State, *Patterns of Global Terrorism: 1988*, 33-34, 74-75 (1989); *McMullen*, 788 F.2d at 597, and the Board itself has found that the PIRA aims its violence at, among others, civilians who oppose the PIRA's objectives and methods. *See id.* at 600 ("The BIA found that the PIRA killed or attempted to kill those who publicly opposed their activities," and an active role in the PIRA "amounts to the assistance of this persecution on account of political opinion") (Goodwin, J., specially concurring). Because Doherty has admitted an active role in the PIRA and has embraced the PIRA without reservation, the Attorney General properly concluded that Doherty "otherwise participated" in persecution on account of political opinion.

[7] The PIRA, a radical offshoot of the IRA, "formed in protest to the perceived inefficacy of the IRA," *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir.1981), which itself used violence to achieve its ends, *id.* Apparently, the founding members of the PIRA believed that the IRA was not violent enough.

pounds of explosives in a car hijacked by the PIRA. In 1980, in a van hijacked by the PIRA, he drove several of his PIRA confederates to a private Belfast house, while the van driver was held captive; took over the house and held hostage the family inside; and engaged in a firefight that resulted in the death of Captain Westmacott of the British Army.

As noted in the opinion dissenting from the Board's decision, "it is fortuitous that the civilian hostages [taken by Doherty and his associates] were uninjured in view of the fact that they were exposed to a gun battle." *Matter of Doherty*, No. A26 185 231, slip op. at 4 (BIA Nov. 14, 1988) (Morris, B.M., dissenting). Even if violence against a democratic government or against such a government's military personnel were a "political" rather than a "criminal" matter, which it surely is not, Doherty's participation in attacks against civilians has given Attorney General Thornburgh a substantial basis for concluding that Doherty has committed serious nonpolitical crimes outside the United States prior to his illegal entry.[8]

Given Doherty's admission of PIRA membership, of involvement in the Westmacott killing, and of offenses against innocent civilians; the low standard of proof under subsection (C); and the statutory imperative of denying

[8] The decision denying Doherty's extradition on the ground that his murder of Captain Westmacott was a "political" offense, *Matter of Doherty by Gov. of United Kingdom*, 599 F.Supp. 270 (S.D.N.Y. 1984), has no precedential value either for the Attorney General or for us. Offenses considered "political" for the purposes of extradition treaties may be considered "nonpolitical" for the purposes of the INA in general and of § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C), in particular. *See McMullen v. INS*, 788 F.2d at 596. In addition, "extradition determinations have no res judicata effect in subsequent judicial proceedings." *Id.* at 597 (citations omitted). Finally, that decision was not appealable under longstanding caselaw, *see United States v. Doherty*, 786 F.2d 491, 495 (2d Cir.1986); *Matter of Mackin*, 668 F.2d 122, 125-30 (2d Cir.1981), and we have therefore had no occasion for direct review of it on the merits.

withholding to one considered undesirable under § 243(h)(2), I believe that Attorney General Thornburgh's decision is unassailable. I fail to see what proper purpose will be served by granting a hearing on Doherty's withholding claim.

The majority, citing *Abudu*, states that "the attorney general's power to deny a motion to reopen based on factors other than the movant's failure to establish a prima facie case or the lack of new evidence is limited to 'cases in which the ultimate grant of relief is discretionary * * * *not withholding of deportation*'. [485 U.S. at 105, 108 S.Ct. at 912]" (emphasis added by majority). Thus, the majority implies, Attorney General Thornburgh erred by resolving this question as if withholding were a discretionary matter. I disagree.

Attorney General Thornburgh resolved Doherty's entitlement to withholding not as a discretionary matter but rather as a legal question governed by the rules set out in § 243(h)(2). Even if *Abudu* were the sole guide for our review, his decision regarding withholding would not be reviewable under the third *Abudu* factor. The real issue is the adequacy of the record and the rationality of the Attorney General's conclusion based on the record. Since the record and reasoning here were more than adequate, a further hearing would be a waste of time and would serve only to delay the final resolution of proceedings which have lasted seven years since Doherty's arrest in 1983.

IV

For the foregoing reasons, I would dismiss both petitions for review and affirm the orders of the Attorneys General.

APPENDIX B

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

In re: Joseph Patrick Thomas Doherty (A26-185-231)

IN DEPORTATION PROCEEDINGS

This matter has been certified to me by the Commissioner of the Immigration and Naturalization Service (INS) from the decision of the Board of Immigration Appeals (BNA). 8 C.F.R. § 3.1(h)(1)(iii). On November 14, 1988, the BIA granted the respondent's motion to reopen these proceedings in order to allow him to apply for asylum and for withholding of deportation and to permit him to redesignate his country of deportation. *Matter of Doherty*, No. A26 185 231 (BIA Nov. 14, 1988). For the reasons set forth below, I disapprove the BIA's decision, and deny respondent's motion to reopen his deportation proceedings.

I.

1. Respondent is a 34-year-old native of Northern Ireland and a citizen of both the United Kingdom (U.K.) and the Republic of Ireland. He has been an active volunteer in the Provisional Irish Republic Army (PIRA) since 1972. The BIA summarized his criminal record as follows:

> He has an extensive criminal record in Ireland beginning with convictions as a juvenile for burglary and larceny. He was sentenced to probation, fines, and 1 month in a training school. At approximately age 15, the respondent joined Na Fianna Eireann, a youth organization in Ireland that is considered to be a stepping stone into the PIRA. When he turned 17, in 1972, he joined the PIRA as a volunteer. In 1973, he was arrested, and later convicted, for possession of a firearm. He was sentenced to 1 year in prison and he served 9 months. In 1974, he was arrested for possession of 80 pounds of explosives. He was convicted and sentenced to 10 years imprisonment. He served 5 years and 9 months of that sentence. During that term of imprisonment, the respondent attempted to escape, but he was unsuccessful. He was convicted of prison breaking with intent to escape and received a sentence of an additional 18 months of imprisonment. After his release from prison in December of 1979, he returned to the PIRA. On May 2, 1980, while on a mission for the PIRA, he was involved in a gun battle in which a British Army Captain was killed. He was tried and found guilty of murder, attempted murder, possession of firearms and ammunition, and belonging to a proscribed organization.

In re Doherty, No. A26 185 231, slip op. at 1-2 (BIA Mar. 4, 1985).

Throughout the course of these proceedings, respondent has never disputed the underlying facts relating to the last set of crimes. On May 2, 1980, he and several other PIRA members seized and occupied a private home, from which they planned to ambush British troops. In the ensuing gunfight with the troops, Captain Herbert Richard Westmacott, a British Army captain, was shot and killed. Respondent was arrested and charged with murder, attempted murder, illegal possession of firearms, and other offenses. On June 10, 1981, after trial, but before a decision was reached, respondent escaped from prison. On July 12, 1981, he was convicted, in absentia, of murder

and the other offenses with which he had been charged, and was sentenced to life imprisonment.

After his escape, respondent made his way to the United States, where he was arrested on June 18, 1983. A formal request for extradition was filed in the Southern District of New York on August 16, 1983. At about the same time, a deportation warrant was also filed against him. On June 28, 1983, respondent filed for asylum and withholding of deportation.

2. The extradition proceeding was brought pursuant to 18 U.S.C. § 3184 and Article VII of the then-existing Treaty of Extradition between the United States and the United Kingdom, Extradition Treaty, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (effective Jan. 21, 1977) [hereinafter "Extradition Treaty"], under which "political offenses" were an exception to extradition. A hearing was held in the United States District Court for the Southern District of New York in March and April of 1984. In December 1984, the court ruled that respondent could not be extradited because the murder he had committed was "of a political character" within the meaning of the Extradition Treaty. The court thus denied the request for extradition. *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270 (S.D.N.Y. 984).

Although the court determined that respondent was not extraditable, it rejected the contention that the proceedings against him in Northern Ireland had failed to provide due process. The court concluded:

> [B]oth Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and . . . the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.

Matter of Doherty by Gov't of United Kingdom, 599 F. Supp. at 276.[1]

3. Immediately upon the conclusion of the extradition proceeding, the deportation proceeding went forward. It was delayed, however, for almost 18 months, from March 18, 1985, until September 3, 1986, as a result of a stay which was entered on respondent's motion, and which the INS opposed. *See Doherty* v. *Meese*, 808 F.2d 938, 941 (2d Cir. 1986).

On September 12, 1986, at a hearing before an immigration judge, respondent, through his counsel, withdrew the applications for asylum and for withholding of deportation that he had filed in June 1983, and conceded deportability.[2] Asked by the immigration judge whether he was saying that he "no longer wish[ed] to apply for asylum and [was] . . . waiving his right to asylum?", respondent's counsel replied, "[t]hat is correct, Your Honor." Respondent's counsel continued: "We would, at this time,

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[1] The United States challenged the denial of extradition by bringing an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, in the Southern District of New York. The district court and the United States Court of Appeals for the Second Circuit both held, however, that bringing the extradition request before another judge was the only proper means of challenging the decision denying extradition. *United States* v. *Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986).

[2] *See* Transcript of Hearing at 36, 38-40, *Matter of Doherty*, No. A26 185 231 (BIA Sept. 12, 1986) [hereinafter "Transcript of Sept. 12 Hearing"]; *see also* Petition of Joseph Patrick Thomas Doherty for an Order to Show Cause for a Writ of Habeas Corpus at para. 43, *Doherty* v. *Meese*, 808 F.2d 938 (2d Cir. 1986) (No. 415, Docket 86-2335) [hereinafter "Doherty Petition"]; Affidavit of Mary Boresz Pike (Counsel for Respondent), sworn to Dec. 2, 1987, at paras. 10-14 [hereinafter "Pike Affidavit"].

withdraw the application for political asylum. The only thing that we would request would, of couse, be the opportunity to desingnate [sic] a country." *See* Transcript of Sept. 12 Hearing, *supra* note 2, at 38. The colloquy between the immigration judge and respondent's counsel continued as follows:

> Q. . . . I just want to be sure there won't be any application for political asylum and/or withholding of deportation, correct?
>
> A. That is correct.
>
> Q. No application for voluntary departure?
>
> A. That is correct.
>
> Q. In other words, there is no application for relief from deportation that you will be making?
>
> A. That is correct.

Id. at 38-39. Respondent designated the Republic of Ireland as his country of deportation, pursuant to 8 U.S.C. § 1253(a). The INS strongly opposed this designation on the ground that it would be prejudical to the interests of the United States to send respondent to Ireland. The INS explained to the court that the deportation of respondent to the United Kingdom was a matter of great interest at the highest levels of the federal government. Transcript of Sept. 12 Hearing, *supra* note 2, at 41-43, 47-48; Transcript of Hearing at 57, *Matter of Doherty*, No. A26 185 231 (BIA Sept. 19, 1986). The court denied the INS's request for permission to submit evidence of additional grounds for deportation, because respondent had conceded deportability and waived his claims to asylum and withholding of deportation. *See* Transcript of Sept. 12 Hearing, *supra* note 2, at 39-40.

One week later, on September 19, 1986, the immigration judge found respondent deportable on his own admissions for having entered this country in February 1982 by fraud

and without a valid immigrant visa. 8 U.S.C. §§ 1182(a)(19)-(20), 1251(a)(1).[3] Over the INS's strenuous objection, the immigration judge ordered respondent deported to the country of his designation, the Republic of Ireland.

At the time of the immigration judge's decision, respondent faced a ten-year sentence of imprisonment in Ireland under a "dual prosecution agreement" between Ireland and the United Kingdom. *Doherty* v. *Meese*, 808 F.2d at 940.[4] Respondent's consent to deportation and his withdrawal of his applications for relief from deportation were apparently prompted by the imminent ratification and implementation of the Supplementary Extradition Treaty between the United States and the United Kingdom, Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, Exec. Report 99-17 (effective Dec. 23, 1986) [hereinafter "Supplementary Treaty"].[5] Under the Supplementary Treaty, respondent could have been extradited directly to the United

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[3] *See of Matter of Doherty*, No. A26 185 231 (BIA Sept. 19, 1986).

[4] It was also likely that respondent would be tried in the Republic of Ireland for his escape from prison in Belfast, Northern Ireland. *See* Doherty Petition, *supra* note 2, at para. 55.

[5] The Supplementary Treaty amended the Extradition Treaty. The Supplementary Treaty had been ratified by the United States Senate on July 17, 1986, and, at the time of the immigration judge's September 19, 1986 decision, was pending before the British House of Commons. Respondent apparently expected the House of Commons to ratify the treaty sometime in October 1986. *See* Doherty Petition, *supra* note 2, at para. 33. The Supplementary Treaty became operative on December 23, 1986.

Under Article 4 of the Supplementary Treaty, the "political offense" exception to extradition in the Extradition Treaty was eliminated with retroactive effect. Thus, ratification and implementation of the Supplementary Treaty might have rendered respondent subject to extradition, despite the prior district court decision denying such a request.

Kingdom, where, as noted, he faced a life sentence for murder. "[Respondent] thus urgently want[ed] to leave the United States for Ireland, where he face[d] only a ten-year sentence, before the British House of Commons act[ed] upon the treaty." *Doherty* v. *Meese*, 808 F.2d at 940.

4. The INS appealed the immigration judge's decision to the BIA. Respondent, however, in an attempt to prevent the INS from continuing to contest respondent's deportation to Ireland, petitioned the district court for a writ of habeas corpus, which was denied on September 25, 1986. *Id.* at 941. Respondent appealed to the Second Circuit.

On December 23, 1986, the Second Circuit affirmed the district court's denial of respondent's habeas corpus petition. In so doing, the court rejected respondent's contention that the government was resisting respondent's departure to Ireland solely for the purpose of assuring his continued availability for extradition to the United Kingdom upon final ratification of the Supplementary Treaty. The court stated that it had jurisdiction to intervene in the pending deportation proceeding "only if the Attorney General is clearly outside the discretion granted to him by Section 1253(a) in rejecting the Republic of Ireland and designating the United Kingdom and is clearly unreasonable in pressing his position through the administrative process." *Doherty* v. *Meese*, 808 F.2d at 942.

The court determined that the INS's appeal of the immigration judge's order to the BIA was not unjustified because it was reasonable for the Attorney General to conclude and to argue that the interests of the United States would be prejudiced by deporting respondent to Ireland. *Id.* at 943. The court stated that the judgment as to whether the interests of the United States would be prejudiced was "an essentially political determination." *Id.* The court also noted that "[t]he lack of precedent hardly

renders the government's position frivolous." *Id.* at 941 n.3. Further, the court pointed out that, in a case such as this, apart from claims such as fraud, lack of jurisdiction, or unconstitutionality, "the determination of the Attorney General is essentially unreviewable." *Id.* at 944 (footnote omitted).

5. Thereafter, on March 11, 1987, the BIA dismissed the INS's appeal of the immigration judge's September 19, 1986, order, and denied an INS motion to supplement the record. The Commissioner of the INS sought review by Attorney General Meese pursuant to 8 C.F.R. § 3.1(h)(1)(iii). The Attorney General granted the INS's request for review and allowed respondent and the INS to submit additional evidence and memoranda.

On December 3, 1987, while the issue of respondent's deportation to Ireland was pending before Attorney General Meese, respondent moved to reopen his deportation proceedings pursuant to 8 C.F.R. §§ 3.2, 3.8, and 242.22, to apply for asylum and withholding of deportation, and to change his designated country of deportation. Motion of Respondent to Reopen or to Reconsider, at 1, *Matter of Doherty*, No. A26 185 231 (BIA Dec. 3, 1987). Respondent claimed that his motion was prompted by a change in Irish law. In the opinion of respondent's counsel, the Extradition (European Convention on the Suppression of Terrorism) Act [hereinafter "Extradition Act"], which went into effect in Ireland on December 1, 1987, would allow respondent's extradition from Ireland to the United Kingdom.[6]

6. On June 9, 1988, Attorney General Meese disapproved the BIA's decision, ruled that the INS had shown

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[6] *See* Pike Affidavit, *supra* note 2, at paras. 25-28; *see also* European Convention on the Suppression of Terrorism, 1977, Europ. T.S. No. 90.

that respondent's deportation to Ireland would be prejudicial to the interests of the United States, and ordered respondent deported to the United Kingdom. *Matter of Doherty*, Mem. Att'y Gen. (June 9, 1988). The Attorney General rested his decision on two separate considerations: first, that respondent's deportation to the United Kingdom would serve the policy of the United States that those who commit violent acts against a democratic state should be promptly and lawfully punished and, second, that the Department of State had shown that respondent's deportation to Ireland rather than to the United Kingdom would be detrimental to the United States' foreign policy interests.[7] Respondent's motion to reopen also was considered in the Attorney General's June 9, 1988, ruling; the motion was remanded to the BIA. *Matter of Doherty*, Mem. Att'y Gen. (June 9, 1988).

7. On November 14, 1988, five months after Attorney General Meese's order, the BIA granted respondent's motion to reopen by a 3-2 vote. *Matter of Doherty*, No. A26 185 231 (BIA Nov. 14, 1988). The BIA majority acknowledged that there is "no absolute right to withdraw a prior designation of a country of deportation." *Id.*, slip op. at 5. However, the BIA found that at the time of his hearing before the immigration judge, respondent had "the reasonable expectation . . . that he would be deported to Eire" and that "the likelihood of his being deported to the United Kingdom appeared remote." *Id.* at 6. "Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable." *Id.*

[7] Respondent has appealed the Attorney General's June 9, 1988, ruling to the Second Circuit. *Doherty* v. *United States Dep't of Justice*, C.A. 88-4084 (2d Cir. filed June 21, 1988). The parties have agreed to suspend any action on that appeal pending the outcome of this appeal by the INS.

The BIA also held that "the Attorney General's decision of June 1988 disallowing the respondent's choice of a country of deportation constitutes changed circumstances which have arisen since the hearing." *Id.* Additionally, respondent had "submitted recently published background evidence which we find to be material to the respondent's case." *Id.* The BIA majority provided no analysis of this evidence to support its conclusion.

Finally, the BIA majority held that respondent's evidence established a prima facie claim of a well-founded fear of persecution. It noted that the INS would have the opportunity to prove that respondent had engaged in conduct which rendered him either ineligible for withholding of deportation or unfit for asylum, and concluded that the motion to reopen should be granted. *Id.*

8. The INS appealed the decision of the BIA to me on December 5, 1988.

II.

The Attorney General has retained the authority to review final decisions of the BIA, 8 C.F.R. § 3.1(h), and he may do so either on his own initiative or upon request. *Id.* § 3.1(h)1(i)-(iii). The relief sought by respondent – reopening of proceedings – is wholly discretionary. The BIA has promulgated regulations governing its consideration of motions to reopen proceedings. *See* 8 C.F.R. §§ 3.2, 3.8, and *infra* note 17. These regulations, however, apply only to the BIA, not to the Attorney General, although of course the Attorney General may refer to these regulations when considering a motion to reopen. The Attorney General's decision is *de novo*; he is not confined to reviewing for error. His decision is final, *see Matter of Doherty*, Mem. Att'y Gen. at 4 (June 9, 1988), subject only to judicial review for "abuse of discretion."[8] This is the

[8] *See INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981); *Bahramnia* v. *INS*, 782 F.2d 1243,

backdrop against which I consider respondent's motion to reopen.

Respondent relies upon three separate grounds in arguing for reopening of his deportation proceedings.[9] First, in

1246 & n.15 (5th Cir.), *cert. denied*, 107 S. Ct. 398 (1986); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1490 & n.16 (5th Cir. 1985); *Muigai* v. *INS*, 682 F.2d 334, 337 (2d Cir. 1982); *Scheiber* v. *INS*, 461 F.2d 1078, 1079 (2d Cir. 1972); *Wong Wing Hang* v. *INS*, 360 F.2d 715, 718-719 (2d Cir. 1966).

[9] Respondent seeks reopening so that he can request asylum and withholding of deportation. Asylum is discretionary with the Attorney General. *INS* v. *Stevic*, 467 U.S. 407, 423 n.18, 426 (1984); *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1219-20 (1987). To be eligible for asylum, the alien must demonstrate that he is a "refugee." 8 U.S.C. § 1101(a)(42)(A). He must show that he is unable or unwilling to return to his country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, group membership, or political opinion—a standard that is lower than the "clear probability" standard in withholding of deportation cases, and that does not require a showing that persecution is more likely than not. *INS* v. *Cardoza-Fonseca*, 107 S. Ct. at 1213, 1222 & n.31; *Ipina* v. *INS*, 868 F.2d 511, 513-14 & n.6 (1st Cir. 1989). The BIA has held that "an applicant for asylum establishes a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." *Matter of Barrera*, Interim Dec. 3093, slip op. at 12 (BIA Jan. 5, 1989).

Asylum requests made after the institution of deportation proceedings shall also be considered as requests for withholding of exclusion or deportation. 8 C.F.R. § 208.3(b); *Matter of Martinez-Romero*, 18 I. & N. Dec. 75, 77 n.6 (1981), *aff'd*, *Martinez-Romero* v. *INS*, 692 F.2d 595 (9th Cir. 1982).

An alien seeking withholding of deportation from any country must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1). Withholding of deportation is nondiscretionary. It must be granted if the Attorney General finds that the alien would be threatened for any of the five reasons listed in the statute. *INS* v. *Stevic*, 467 U.S. at 421 n.15, 426; *INS* v. *Cardoza-Fonseca*, 107 S. Ct. at 1212. The burden is

relying upon the BIA opinion, he claims that Attorney General Meese's order that he be deported to the United Kingdom because deportation to Ireland would be prejudicial to the interests of the United States, *see id.* at 7-9, was an unforeseen, adverse administrative decision, constituting a "new fact."[10] Second, he claims that, after he admitted deportability and withdrew his claims for asylum and withholding of deportation, there was a change in Irish law as a consequence of the December 1, 1987 implementation of the Extradition Act in Ireland. Specifically, he contends that, if deported to Ireland, the provisions of the Extradition Act would result in his "certain" extradition to the United Kingdom.[11] He argues that had he known of this subsequent development he might have made different decisions at his deportation proceedings.

As a third ground for reopening, respondent claims that there is new and material evidence bearing on his deportability that should now be considered. The asserted new evidence consists of (1) a 1988 report by Amnesty International on the British security forces' treatment of suspected IRA members, and other supporting documents; (2) an affidavit from his mother, relating chiefly to the experiences of her family and other republican sympathizers with the

on the alien to establish a "clear probability" of persecution on any one of the statutory grounds. *INS* v. *Stevic*, 467 U.S. at 430; *Ipina* v. *INS*, 868 F.2d at 515.

[10] Respondent does not make this argument in terms. However, the BIA specifically granted the motion to reopen on the ground that Attorney General Meese's order was, in effect, new evidence. For this reason, I address the argument here.

[11] *See* Brief for Respondent-Appellee to the Attorney General at 14 (April 26, 1989) [hereinafter "Respondent's Brief"].

British security forces;[12] and (3) affidavits from respondent's counsel.[13]

I do not believe that any of these three arguments justifies reopening respondent's deportation proceedings and, accordingly, I deny the motion.

As to the arguments relied upon by respondent in support of the motion, first, throughout these proceedings, respondent knew that the Attorney General might deny his designation of Ireland as the country to which he would be deported. This authority is expressly reserved to the Attorney General by statute, 8 U.S.C. § 1253(a), and the INS consistently took the position that it would oppose respondent's deportation to any country other than the United Kingdom. It also informed respondent that his deportation to the United Kingdom was a matter of interest at the highest levels of the federal government. It is clear from the record that respondent made the conscious decision that he would rather be exposed to the risk that the Attorney General would deny his deportation to Ireland than to the risk of extradition directly to the United Kingdom by the United States under the Supplementary Treaty, then in the final stages of ratification.

It is unlikely that the Attorney General's decision to avail himself of his recognized authority to reject a deportee's designation can ever constitute new evidence. It certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of

[12] *See* Affidavit of Mary (Maureen) Doherty, sworn to Dec. 2, 1987 [hereinafter "M. Doherty Affidavit"].

[13] *See* Pike Affidavit, *supra* note 2; Supplemental Affidavit of Mary Boresz Pike, sworn to Aug. 9, 1988 [hereinafter "Pike Supplemental Affidavit"].

the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interests should prevail. Appeal to the Attorney General and decision consistent with the interests of the United States under such circumstances should reasonably be expected. *See* discussion *infra* at [65a-67a.]

Second, on the assumption that the implementation of the Extradition Act represented a change in law, it did not change the rules of decision applied by the immigration officials or Attorney General Meese. If the implementation of the Extradition Act represents a change in fact, it is an immaterial change. The Extradition Act gave effect in Irish law to the provisions of the European Convention on the Suppression of Terrorism [hereinafter "European Convention"], to which the United Kingdom is also a party. The Irish Government expressed its intention to sign the European Convention in November 1985, and did in fact sign it in February 1986. Accordingly, respondent knew or should have known well before December 1, 1987 that Ireland had endorsed the provisions of the European Convention. Furthermore, respondent was subject to extradition to the United Kingdom from Ireland even before Ireland became a party to the European Convention. Thus, Ireland's subsequent adoption and implementation of the Extradition Act did not in itself create a risk of extradition; nor did it materially increase the risk that respondent would be extradited to the United Kingdom. *See* discussion *infra* at [67a-73a.]

Third, much of the "new" factual evidence proffered by respondent is not new at all; it was available at the time of the earlier proceedings, and respondent offers no reason for his failure to present it at that time. The evidence that was not available is not material; for the most part, it is cumulative of evidence presented in the earlier pro-

ceedings. It does not support existence of a threat different in character from that known at the time of the deportation proceedings. *See* discussion *infra* at [74a-78a.].

Thus, none of the grounds offered for reopening respondent's deportation proceedings is sufficient to warrant reopening.

In addition to finding the arguments advanced in support of reopening insufficient, I would, in the exercise of my discretion and as an independent basis for decision, deny the motion to reopen on the ground that respondent explicitly waived his claims to asylum and withholding of deportation as part of a calculated plan to ensure immediate deportation to Ireland before the United Kingdom ratified its treaty with the United States, which would have allowed respondent to be extradited directly to the United Kingdom. *See* discussion *infra* Part IV.[14] The integrity of the administrative process dictates that a deportee who, with the advice and assistance of counsel, makes such deliberate tactical decisions, not be permitted to disown those decisions merely because they ultimately result in action adverse to his interests. This is especially the case where the possibility of that action was not only foreseeable but foreseen.

Finally, I also deny respondent's motion to reopen on the unrelated ground that respondent would not ultimately be entitled to either asylum, the discretionary relief he

[14] *See, e.g., Communication Workers of America, Local 5008* v. *NLRB*, 784 F.2d 847, 851 (7th Cir. 1986) (court must sustain administrative decision if any of the independent grounds that support the decision is correct).

seeks, or withholding of deportation, the nondiscretionary relief he seeks. *See* discussion *infra* Part V.[15]

Respondent simply has not carried the heavy burden of showing either that he is entitled to reopen his deportation proceedings or that, as a matter of discretion, he should be allowed to do so. The record reveals clearly that respondent made deliberate, well-informed, tactical decisions throughout the proceedings to ensure deportation, if at all, to the country of his choice; that he recognized and knowingly assumed the risks that attended each decision; and that all that has happened is that the risks he recognized have in fact materialized. That which the Supreme Court said in the context of a similar attempt to rescind a litigating decision in an immigration proceeding is applicable to respondent:

> [h]is choice was a risk, but calculated and deliberate and such as follows a free choice. [Respondent] cannot be relieved of such a choice because hindsight seems to indicate to him that his decision . . . was probably wrong . . . . There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Ackermann v. *United States*, 340 U.S. 193, 198 (1960).[16]

[15] *See supra* note 14.

[16] *See also Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 520 (2d Cir. 1976) (alien's waiver of claimed right to counsel was binding, despite her mistaken impression of the law; denial of motion to rehear upheld), *cert. denied*, 434 U.S. 819 (1977); *Small* v. *INS*, 438 F.2d 1125, 1128 (2d Cir. 1971) (alien's waiver through counsel of right to present further evidence at new hearing was binding; deportation order affirmed); *La Franca* v. *INS*, 413 F.2d 686, 690 (2d Cir. 1969) (no reason to reopen proceeding to permit alien to try to establish eligibility for voluntary deportation where alien's counsel had previously waived request for hearing on voluntary departure); *Matter*

III.

I turn first to the claims that respondent should be permitted to reopen his deportation proceedings because of (1) the unexpected, adverse decision of Attorney General Meese ordering him deported to the United Kingdom, (2) the supervening implementation in Ireland of the Extradition Act, *see* Respondent's Brief, *supra* note 11, at 14; Pike Affidavit, *supra* note 2, at paras. 24-28, and (3) the affidavits, book and report submitted by respondent. These events are portrayed as "new facts" warranting a reopening of proceedings. The BIA held that Attorney General Meese's order justified reopening and permitting respondent to withdraw his prior waivers of claims to asylum and withholding of deportation. *See* Respondent's Brief, *supra* note 11, at 9 & n.5. Respondent raised, but the BIA was not required to decide, the question of the effect of the Extradition Act because of its holding that Attorney General Meese's order was alone sufficient grounds upon which to reopen. *See Matter of Doherty*, No. A26 185 231, slip op. at 5-6 (BIA Nov. 14, 1988). The BIA suggested, but did not explicitly hold, that the affidavits and books would be sufficient to justify reopening. *Id.* at 6.

Deportation proceedings may be reopened by the BIA on the basis of new evidence if the evidence "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2.[17] A

of M-, 5 I. & N. Dec. 472, 474 (1953) (counsel's decision not to file application for suspension of deportation during pendency of deportation hearing was analogous to error of judgment in conduct of defense, since filing became untimely; denial of motion to reopen would not violate due process; motion was granted "purely as a matter of grace").

[17] "Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 3.8. "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that

motion to the BIA to reopen a deportation proceeding on the basis of previously unavailable evidence is "appropriate[ly] analog[ized]" to "a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *INS* v. *Abudu*, 108 S. Ct. 904, 914 (1988). Motions to reopen deportation proceedings on this ground are plainly "disfavored," *id.* at 913,[18] for reasons "comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence." *Id.* (footnotes omitted).[19] Generally, a motion to reopen on the grounds of new evidence will

evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* § 3.2.

Similarly, a motion to the immigration judge for reopening pursuant to 8 C.F.R. § 242.22 "will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Except as otherwise provided, a motion to reopen under 8 C.F.R. § 242.22 "shall be subject to the requirements of section 103.5," which states in part that "[a] motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 103.5(a). A motion to reopen pursuant to 8 C.F.R. § 208.11 on the basis of an asylum request "must reasonably explain the failure to request asylum prior to the completion of the . . . deportation proceeding." *See also Ghosh* v. *Attorney General*, 629 F.2d 987, 989 (4th Cir. 1980); *Matter of Haim*, Interim Dec. 3060, slip op. at 3 (BIA April 11, 1988); *Matter of Lam*, 14 I. & N. Dec. 98, 99 (1972).

[18] *See also INS* v. *Jong Ha Wang*, 450 U.S. 139, 143 n.5 (1981) (regulatory language disfavors reopening).

[19] Failure to introduce previously available, material evidence, 8 C.F.R. § 3.2 (or, in an asylum application case, failure to reasonably explain the failure to apply for asylum initially, *id.* 208.11), is an independent ground on which the BIA may deny a motion to reopen. *INS* v. *Abudu*, 108 S. Ct. at 911.

not prevail unless the profferred evidence is such that it probably would change the outcome of the prior proceeding.[20]

While the BIA standards apply only to the BIA, not to the Attorney General, I refer to them in my consideration of the arguments made for reopening in this part because I believe they embody neutral inquiries that go directly to the issue of the applicant's justification for asking for, and the administrative system's justification for allowing, the reopening of proceedings previously closed.

Under these standards, I do not believe that either Attorney General Meese's decision or the implementation of the Extradition Act warrants reopening of respondent's deportation proceedings. Neither constitutes previously unobtainable material evidence as required by the regulations, *see* 8 C.F.R. §§ 3.2, 3.8, 242.22, nor a reasonable justification for permitting respondent to withdraw his waiver of his claim for asylum. *Id.* at 208.11.[21]

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[20] *See United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976) (standard is generally applied on motions for new criminal trials); *Philip* v. *Mayer, Rothkopf Industries, Inc.*, 635 F.2d 1056, 1063 (2d Cir. 1980) (no new trial in civil case where movant's post-trial evidence would not "change our result here"); *United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975) (post-trial evidence must be "so material that it would probably produce a different verdict"); *United States* v. *On Lee*, 201 F.2d 722, 724 (2d Cir.) (same), *cert. denied*, 345 U.S. 936 (1963).

[21] It is unnecessary for me to address (and I do not) the question whether respondent has established a prima facie case for the substantive relief sought. The Attorney General may decide not to reopen a deportation proceedings, even if the movant establishes a prima facie case for granting asylum or withholding of deportation. *See INS* v. *Abudu*, 108 S. Ct. at 912-13 (holding that motion to reopen may be denied in an asylum case if alien fails reasonably to explain failure to file asylum claim initially, and stating that "the BIA has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief" and that "in a given case, the BIA may determine . . . as a sufficient ground for denying relief . . . whether the alien has produced previously unavailable, material evidence (§ 3.2)"); *see also INS* v. *Rios-Pineda*, 471 U.S. at 449 ("even assuming that respondents' motion to reopen made out a prima facie case of eligibility for suspension of deportation, the Attorney General had discretion to deny the motion to reopen"); *INS* v. *Jong Ha Wang*, 450 U.S. at 139, 144 n.5 (8 C.F.R. § 3.8 "does not affirmatively require the Board to reopen the proceedings under any particular condition"); *Bahramnia* v. *INS*, 782 F.2d at 1249; *Yousif* v. *INS*, 794 F.2d 236, 241 (6th Cir. 1986); *Ahwazi* v. *INS*, 751 F.2d 1120, 1122 (9th Cir. 1985); *Matter of A- G-*, Interim Dec. 3040, slip op. at 3 (BIA Dec. 28, 1987); *Matter of Barocio*, Interim Dec. 2992 (BIA Aug. 8, 1985).

1. Attorney General Meese's June 9 order cannot properly be considered a "new fact." While the actual fact of the order is in some sense "new," the possibility that the Attorney General would refuse to accept respondent's designation of Ireland as the country to which he wanted to be deported was known, or should have been known, throughout the proceedings.

The authority of the Attorney General, in his discretion, to deny deportation to the country designated by an alien is plain on the face of the same statute that gives the alien the right to designate the country to which he wishes to be deported:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, *unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.*

8 U.S.C. § 1253(a) (emphasis added). Given this explicit reservation of authority and its appearance in the very

same sentence that accorded respondent the right to designate Ireland his country of deportation, it is inconceivable that anyone represented by counsel could not know that there always existed a risk that the Attorney General would deny respondent's deportation to Ireland to protect the interests of the United States.

Even if the possibility of denial by the Attorney General were not so clear from the face of the statute alone, it should have been evident from the position taken by the Government from the outset of the proceedings. At the September 12, 1986, hearing at which respondent designated Ireland as his country of deportation, counsel for the INS objected to that designation, and stated that the INS would take the position that deportation to any country other than the United Kingdom would be prejudicial to the interests of the United States. Transcript of Sept. 12 Hearing, *supra* note 2, at 41-43, 47-48. The INS even represented that there was interest at the highest levels of the federal government in having respondent deported to the United Kingdom. *Id.* at 47 ("this matter is of some concern at the highest levels of government and . . . was under consideration by the legal advisor to the State Department and will be under the personal review of Attorney General Meiss [sic] this coming week.").

Given these representations by the INS, respondent clearly should have understood, if he did not, that "[a]fter the BIA determination, the case might ultimately be referred to the Attorney General at his request, at the request of the Chairman or a majority of the BIA, or at the request of the Commissioner of the INS." *Doherty* v. *Meese*, 808 F.2d at 942. Contrary to the conclusion of the BIA, *Matter of Doherty*, No. A26 185 231, slip op. at 6 (BIA Nov. 14, 1988), once this possibility was acknowledged, respondent reasonably should have known

(again, if he did not) that the Attorney General ultimately might forbid deportation to Ireland. The ultimate decision in an administrative process cannot itself constitute "new" evidence to justify reopening. If an adverse decision were sufficient, there could never be finality in the process.

2. Respondent also characterizes Ireland's implementation of the Extradition Act, and specifically the provisions permitting extradition to the United Kingdom, as a supervening change requiring reopening of the proceedings. He terms this asserted change "the watershed event," Respondent's Brief, *supra* note 11, at 11-12, "the gravamen of [his] motion to reopen," *id.* at 14, and "[t]he event warranting the motion," Pike Affidavit, *supra* note 2, at para. 5.[22] For the reasons below, I do not believe that implementation of the Extradition Act was a "new fact." Moreover, even assuming that it was new and did represent a change in Irish law, it is irrelevant, given that Attorney General Meese ordered respondent deported to the United Kingdom not Ireland.

It is plain that implementation of the Extradition Act was not a "new" fact. In the Anglo-Irish Agreement entered into at Hillsborough, Northern Ireland on November 15, 1985, the Irish Government expressed its intention "to accede as soon as possible to the European Convention on the suppression of terrorism." Anglo-Irish Agreement, Nov. 15, 1985, Ireland–United Kingdom, 24 I.L.M. 1579, 1581 (1985). Ireland signed the European

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[22] At one time, respondent suggested that the change in Irish law was the sole cause of his motion. *See* Reply Brief of Respondent-Appellee to Opposition to Respondent's Motion to Reopen or To Reconsider at 6 (April 22, 1988) ("The cause of [respondent's motion's] December 3, 1987, filing was the implementation on December 1, 1987, of the Extradition Act. No grounds for its filing existed until December 1, 1987; respondent can hardly be faulted for not having filed it prior to that date.") (footnote omitted).

Convention on February 24, 1986, *see, e.g., Ireland Signs Terrorism Convention*, Fin. Times, Feb. 25, 1986, § 1, at 4, col. 4, more than six months *before* respondent withdrew his applications for asylum and for withholding of deportation and conceded deportability. *See* discussion *supra* at [49a-50a.] Both the November 1985 Anglo-Irish Agreement and Ireland's February 1986 signing of the European Convention were widely publicized. *See, e.g., Fitzgerald Discusses Anglo-Irish Pact, U.S. Aid,* Ir. Echo, March 22, 1986, at 6, col. 1; Holland, *Ireland to Sign Anti-Terrorist Convention,* Ir. Echo, March 1, 1986, at 2, col. 1; *Complete Text of Anglo-Irish Agreement on Ulster*, The Times (London), Nov. 16, 1985, at 4, col. 1. Respondent, having expressly based his designation on a counseled understanding of Irish extradition laws, is properly chargeable with knowledge of Ireland's signing of the European Convention.

The Extradition Act, which gave effect in Irish law to the European Convention and amended the Extradition Act of 1965, was passed on January 21, 1987. Extradition (European Convention on the Suppression of Terrorism) Act, No. 1 (1987). Section 13 of the Extradition Act provided that its implementation was suspended until December 1, 1987, subject to the condition that resolutions of both Houses of the Irish Parliament could bring it into force at an earlier date or provide for further postponement. *Id.* § 13.[23] In sum, "the watershed event" upon which respondent relies was neither sudden nor unforeseeable. Instead, it was the logical culmination of a

[23] Pursuant to Section 13, the Extradition Act was automatically implemented on December 1, 1987. Acceleration or postponement of the implementation date, however, would not have affected the Extradition Act's applicability to respondent. By its terms, the Extradition Act applies to offenses committed or alleged to have been committed "before or after" the date of passage, January 21, 1987. *Id.* § 1(4).

lawmaking process that had been set in motion more than two years prior to December 1, 1987.

Even were the fact of the Extradition Act "new," it would not justify reopening of the deportation proceedings. A supervening change in the law does not generally constitute a reason for granting a new trial or for amending a judgment, even if the litigant has abandoned a claim or defense that might be meritorious in light of the change.[24] And, as noted, a change in law that would not constitute grounds for a new trial ordinarily does not justify reopening deportation proceedings. *INS* v. *Abudu*, 108 S. Ct. at 913-14. Some courts have held that an exception to this general rule against new trial exists where the change in law would affect the rule pursuant to which the prior decision was made. *See, e.g., United States* v. *Bank of America National Trust & Savings Association*, 51 F. Supp. 751, 751 (N.D. Cal. 1943). *But see McMann* v. *Richardson*, 397 U.S. 759, 774 (1970). Here, however, the Extradition Act did not alter the rules of decision applied by the immigration judge or the Attorney General in either the Section 1253 proceedings or the asylum and withholding of deportation proceedings. As to the former, the immigration judge and Attorney General Meese ordered respondent deported to Ireland and the United Kingdom, respectively, based upon their assessments of the foreign policy interests of the United States. The interests of the United States, and the compatibility of deporting respondent to either country with those interests, are the same now as they were prior to the implementation of the Extradition Act. As to the latter, the Extradition Act could not have and did not change the

[24] *See* Fed. R. Civ. P. 59(a); *Del Rio Distributing, Inc.* v. *Adolph Coors Co.*, 589 F.2d 176, 178-79 (5th Cir.), *cert. denied*, 444 U.S. 840 (1979).

standards that apply to respondent's asylum and withholding of deportation claims under the statutes of the United States. Accordingly, any change in law wrought by the Extradition Act does not call into question the legal correctness of the decisions that were made by either the immigration officials or Attorney General Meese.

Respondent presumably would argue that, if not a change in law, the implementation of the Extradition Act must represent a change in fact justifying reopening of the proceedings because the Extradition Act expressly provides for extradition by Ireland to the United Kingdom. This argument, too, is unpersuasive.

I do not believe that the Extradition Act's provisions, as they relate to respondent, represent a change in fact that would warrant reopening these deportation proceedings. Respondent was extraditable by Ireland to the United Kingdom before the Extradition Act was implemented; he would be extraditable under the Extradition Act. Indeed, respondent himself repeatedly emphasized the serious risk of extradition by Ireland before passage of the Extradition Act in arguing for affirmance of the immigration judge's order that he be deported to Ireland.[25] For example, in his Brief for Respondent-Appellee Joseph Patrick Thomas Doherty at 16 (Dec. 19, 1986), he states, "the Service fails to note that decisions of the Irish Supreme Court are viewed as having vitiated the political offense exception, thereby removing any obstacle to respondent's extradition from Ireland to Northern Ireland. *See, e.g, McGlinchey*

[25] *See* Doherty Petition, *supra* note 2, at paras. 53-54; Brief for Respondent-Appellee Joseph Patrick Thomas Doherty at 16 (Dec. 19, 1986); Reply of Respondent to Opposition of the INS to Respondent's Motion for Summary Dismissal at 7 n.5 (Oct. 27, 1986); Brief for Appellant John Patrick Thomas Doherty at 14 (Oct. 2, 1986).

v. Wren, 3 Ir. L. Rep. Monthly 169 (1982)." In the Doherty Petition, *supra* note 2, at paras. 53-54, respondent's attorney, Stephen Somerstein, stated:

> The Republic of Ireland . . . has extradition arrangements with the United Kingdom and has recently extradited to Northern Ireland individuals who had raised the political offense exception as a defense to their extradition, but were found by the Irish courts to be non-political offenders. Upon his deportation to Ireland, Mr. Doherty is subject to extradition from Ireland to Northern Ireland pursuant to a request therefor by the English government. His case will be considered by the courts of the Republic of Ireland pursuant to the well established law of that country in an historical context but best understood by the Irish and British themselves.

The only difference since implementation of the Extradition Act appears to be that extradition is now expressly provided for by statute, whereas previously extradition was simply ordered on the basis of less formal "extradition arrangements" between the United Kingdom and Ireland. *See* Doherty Petition, *supra* note 2, at para. 53. Given that respondent faced a serious risk of extradition by the United Kingdom before implementation of the Extradition Act, it cannot be said that the mere express provision for extradition in the statute constitutes new evidence.

Respondent claims that the Extradition Act transformed "the possibility of [his] removal from Ireland to the United Kingdom . . . into a certainty." *See* Respondent's Brief, *supra* note 11, at 14. Respondent's effort to minimize the risk of deportation by Ireland before implementation of the Extradition Act contradicts the statements that he made before the BIA in defense of the immigration judge's order deporting him to Ireland. *See* discussion *supra* note 25.

Furthermore, it is unsupported by the provisions of the Extradition Act itself which, incorporating the terms of the European Convention, provide for denial of extradition where

> there are substantial grounds for believing that –
>
> (ii) the warrant was in fact issued for the purpose of prosecuting or punishing [the person named] on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of these reasons.

Extradition (European Convention on the Suppression of Terrorism) Act, No. 1, § 8 (1987); *see also id.* § 9. Thus, existing Irish law explicitly preserves for respondent the right to raise essentially those claims that he would have relied upon under pre-existing Irish law. Accordingly, if respondent has a meritorious claim that extradition to the United Kingdom by Ireland would result in persecution, he could raise that claim today before Irish officials who, as respondent has previously suggested, *see* discussion *supra* at [70a-71a], would view his claim with greater understanding.[26] The reasonable inference therefore is

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[26] Indeed, there is reason to believe that the Extradition Act has actually enhanced the defenses available to an individual seeking to resist extradition from Ireland to the United Kingdom. Under the Extradition (Amendment) Act, No. 25 (1987), the Attorney General of Ireland is prohibited from endorsing for execution an arrest warrant under the Extradition Act unless he is of the opinion that "there is a clear intention to prosecute or . . . continue the prosecution of, the person named or described in the warrant concerned for the offence specified therein" in the country seeking extradition, and "such intention is founded on the existence of sufficient evidence." *Id.* § 2(1)(a). Furthermore, extradition may also be refused on the grounds that, "by reason of the lapse of time since the commission of the offence . . . or the conviction of the person named . . . and other exceptional circumstances, it would be unjust, oppressive or invidious to deliver him up . . . ." *Id.* § 2(1)(b). At least one recent study indicates that the Extradition Act does not go as far as the Irish Supreme Court has gone in circumscribing the political offense exception. G. Hogan & C. Walker, *Political Violence and the Law in Ireland* 292-93 (1989).

The actual administration of Irish extradition law after the implementation of the Extradition Act also suggests that it is less than certain that respondent would be extradited to the United Kingdom were he deported to Ireland. On December 13, 1988, the Attorney General of Ireland issued a statement rejecting a request by the government of the United Kingdom to extradite the suspected PIRA terrorist Patrick Ryan, whom the British authorities wished to try for alleged terrorist activities, including conspiracy to murder, possession of explosives, and conspiracy to cause explosions. *See, e.g.*, Rule, *Irish Deny British Bid to Extradite Priest Suspected of Aiding I.R.A.*, N.Y. Times, Dec. 14, 1988, § A, at 3, col. 1. In view of the Irish Attorney General's decision not to comply with that extradition request, it seems entirely possible that a request to extradite respondent from Ireland might also be rejected.

that respondent cannot credibly maintain now that the change in Irish law has made his return to the United Kingdom inevitable, and that, as a consequence, he should be permitted to reopen and redesignate a country other than Ireland.[27]

Respondent's argument on the Extradition Act comes down to the fact that he believes that he will be given a more sympathetic hearing on an asylum or withholding of deportation claim in this country than he would receive on a denial of extradition claim in his own country. Absent reason to think that respondent will not receive a fair hearing in his home courts of Ireland, this is simply not a basis for reopening his deportation proceedings.

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[27] Even were I to assume that implementation of the Extradition Act increased the risk that respondent would be extradited to the United Kingdom from Ireland, I would not grant the motion to reopen respondent's proceedings. Any change in the risk of extradition would necessarily be immaterial, given that the risk was "serious" before the implementation of the Extradition Act and is no more than serious (*i.e.*, not certain) today.

I would reject respondent's claim based upon implementation of the Extradition Act on a separate and independent ground: even if I agreed that the Extradition Act was a new fact and constituted a change in Irish law, I believe that any change in Irish law is irrelevant. Attorney General Meese determined that it would be against the interests of the United States to deport respondent to Ireland, and in furtherance of our national interests to deport him to the United Kingdom where he could be promptly punished for the crimes he has committed. Mem. Att'y Gen. at 7-9 (June 9, 1988). Unless I overturn Attorney General Meese's order, which I have no reason to do, a change in Irish law has no effect upon respondent. Respondent cannot be deported to Ireland because of the extant determination that that would be contrary to the interests of the United States, and he cannot claim asylum against deportation to the United Kingdom because he assumed the risk of deportation to the United Kingdom when he designated Ireland. *See* discussion *supra* at [65a-67a.] This is unlike the situation where an alien designates a particular country and there is a subsequent change in the country that increases the likelihood of his persecution in that country. In that circumstance, the alien may be harmed by the change because he is being deported to the country in which the change occurred. Here, in contrast, assuming *arguendo* that there was a change in Irish law, that change cannot affect respondent because he is not going to be deported to Ireland.

3. Respondent also urges reopening on the ground that he is profferring new evidence in the form of affidavits and documents. This evidence is not both material and previously unobtainable. *See* 8 C.F.R. §§ 3.2, 242.22.[28] "When an alien has already had one full deportation hearing, with all the procedural rights accompanying it, . . . he or she may have it reopened only upon a showing of significant new evidence." *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976) (*per curiam*). Substantially all of the evidence submitted by respondent is either cumulative of that which he has previously presented, discoverable long ago, or not material in light of the evidence that was presented. None of the evidence supports existence of a threat of persecution of which respondent was unaware or a material change in the character of a threat previously recognized.

(a) Respondent proffers certain documents, including a report by Amnesty International, *United Kingdom/ Northern Ireland: Killings by Security Forces and "Supergrass" Trials* (1988) [hereinafter "Amnesty Report"], and a book relied on by Amnesty International in its report, *The Stalker Affair: The Shocking True Story of Six Deaths and a Notorious Cover-Up* (1988), by John Stalker, former Deputy Chief Constable of the Greater Manchester (U.K.) Police Force, which he maintains contain new evidence of the threat he faces by deportation.[29] Both the Amnesty Report and the Stalker book focus on allegations that British security forces have killed or wounded unarmed individuals suspected of membership in republican armed opposition groups, as part of a government policy of eliminating rather than arresting such individuals. The incidents of "particular concern" to Amnesty International were "the killings of six unarmed persons in late 1982." Amnesty Report at 7; *see id.* at 17-25

[28] The BIA provided no analysis to support its conclusory assertion that "respondent has submitted recently published background evidence which we find to be material to the respondent's case." *Matter of Doherty*, No. A26 185 231, slip op. at 6 (BIA Nov. 14, 1988). Nor did Board Member Heilman provide any analysis of these materials in his concurring opinion.

[29] The contents of these documents are summarized by respondent's counsel in the Pike Supplemental Affidavit, *supra* note 13.

(discussing the 1982 events). Information concerning these events was available to respondent well before he brought his motion to reopen, and indeed even before he withdraw his claims for asylum and withholding of deportation in September 1986. *See Matter of Lam*, 12 I. & N. Dec. 696 (1968).[30] Thus, although the Amnesty Report itself first appeared in 1988, respondent could, with due diligence, have presented significant amounts of the information contained in it at a much earlier stage of these proceedings.[31] He offers no reasonable explanation for his failure to do so.

(b) Respondent also proffers an affidavit from his mother, describing her family's dealings with the British security forces, and with Ulster "unionist" elements outside the government.[32] Even accepting as true the recitals

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[30] *Lam* is closely analogous to this case. In *Lam*, the BIA denied a concedely deportable alien's motion to reopen in order to withdraw his designation of Hong Kong as his country of deportation, and to permit him to apply for temporary withholding of his deportation thereto. The alien claimed that he should have been given the opportunity to withdraw his designation because of Communist riots that broke out in Hong Kong in May 1967. He contended that he had fled from mainland China as a refugee from Communism, and that the riots gave rise to a fear that he would be persecuted by the Communists if he were sent to Hong Kong. The BIA denied his motion, in part because his evidence was not previously unobtainable: the movant could have advanced his claim for asylum in a July 1967 hearing, *e.g.*, two months after the riots, but had not done so.

[31] Amnesty International's concerns over the causes of the incidents against Irish republic groups do not bear on the treatment of individuals held in prison for criminal activities. Assuming for the purposes of this motion that British security forces have on occasion sought to kill suspected republican opposition members who were outside their custody, it does not follow that an individual actually in the keeping of British forces would also be exposed to such a threat.

[32] The affidavit's references to the conduct of nongovernmental "unionist" elements relate generally to the unstable conditions in

set forth, the affidavit merely presents evidence that was discoverable earlier. Again, he offers no explanation as to why he did not proffer the evidence during any of the earlier proceedings.[33]

Moreover, the evidence is essentially cumulative of that offered previously. The theme of the affidavit is that a longstanding pattern of conduct by British military and police forces in Northern Ireland, coupled with the violent activities of pro-unionist elements among the Protestant population, indicates the presence of danger to suspected republican sympathizers generally, and particularly to the respondent and his family.[34] This claim, and indeed much of the evidence cited to support it, is substantially the same as that presented by respondent when he first claimed for relief in June 1983; it does not suggest existence of either a new source of persecution or a heightened danger of persecution from an existing source which respondent did not previously apprehend.[35] In fact, substantial portions

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Northern Ireland, but do not substantiate a claim that he would be threatened by persecution at the hands of British *governmental* authorities. *Cf. Matter of A- G-*, Interim Dec. 3040, slip op. at 5-6.

[33] The affidavits of respondent's counsel, *supra* notes 2 and 13, also fail to provide previously unobtainable material evidence. The pertinent facts recited therein are found elsewhere in respondent's submissions or are otherwise matters of record.

[34] The danger indicated, it should be noted, need not be understood as a danger of *persecution*. The lawful use of force by authorized officials which is reasonably aimed at detecting, preventing, or punishing criminal activity does not support a claim of persecution. The affiant's statement does not attempt to distinguish such activity on the part of the British military and police from the other types of conduct she describes.

[35] *See Ganjour* v. *INS*, 796 F.2d 832, 838 (5th Cir. 1986) (application for reopening untimely where based on information from telephone call by alien's sister in Iran predating immigration hearing and appeal); *Young* v. *INS*, 759 F.2d 450, 456-57 (5th Cir.) (affidavit

of Mrs. Doherty's affidavit relate to matters which occurred even before respondent withdrew his claims for asylum and withholding of deportation.[36] Other events of more recent occurrence, although they may comprise information not previously available to respondent, are not sufficiently material to warrant reopening.[37]

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stating that alien's daughter had recently been arrested and interrogated about him by Guatemalan police was cumulative of prior evidence), *cert. denied*, 474 U.S. 996 (1985); *contrast Bernal Garcia* v. *INS*, 852 F.2d 144, 146-47 (5th Cir. 1988) (new evidence consisted of letter received after conclusion of deportation proceedings relating previously unknown death threat made two weeks earlier); *Ananeh-Firempong* v. *INS*, 766 F.2d 621, 626 (1st Cir. 1985) (supporting affidavits described political events "that, in relevant part, had not occurred until after [movant's] earlier deportation proceedings had concluded").

[36] *See* M. Doherty Affidavit, *supra* note 12, at paras. 1-20, 22-23, 25-27, 36-38 (relating information, substantially all of which was available prior to respondent's withdrawal of his claims for asylum and withholding of deportation on September 12, 1986). Thus, for instance, the affiant's accounts of arrest, trial, and acquittal of respondent's sister on a charge of murder in 1983, *see id.* at para. 20, or of subsequent events in 1985 and 1986 involving her da ghter and of the man with whom her daughter lives, *see id.* at paras. 23-28, would appear to have been available to respondent well before his waiver of his asylum claim. Indeed, in his 1983 application for asylum, respondent referred to arrests of his mother, father, and three sisters at various times in the *prior twelve* years, and to the bombing of his family's house *in 1974* by what he described as a "quasi-official Protestant group." *See* Respondent's Application for Political Asylum, signed June 27, 1983. Much of respondent's mother's affidavit simply elaborates on or adds detail to such allegations.

[37] For example, the affiant states that her son-in-law had been arrested about five weeks before she made out her affidavit, and that while he was detained, the police "made abusive remarks to him" about respondent. M. Doherty Affidavit, *supra* note 12, at para. 35. Again, for example, the affiant states that on two unidentifeid occasions on which her daughter was detained by the police, "the interrogators talked about [respondent] and what would be done to him upon his return." *Id.* at para. 24. Such evidence is not different in tenor from the allegations respondent made when originally claiming asylum in 1983. Furthermore, the statements attributed to the security personnel are ambiguous. Bearing in mind that respondent has been convicted of a murder, "abusive" statements about him by the police, or statements about "what would be done to him" if he were returned, do not have to be understood as implied threats of persecution on forbidden grounds.

Other submissions by the affiant concern, for example, the exposure of an alleged conspiracy in September 1987 by nongovernmental "unionist" elements to murder Anthony Hughes, the man with whom affiant's daughter lives. *Id.* at paras. 31-32. Such evidence is not relevant to establishing that the respondent would have a well-founded fear of persecution at the hands of *governmental* authorities, or that they would threaten him with loss of life or freedom for proscribed reasons.

Finally, other parts of affiant's statements, *e.g.*, *id.* at para. 40, are cumulative of evidence submitted elsewhere in this motion.

[38] Again, here, as in Part III *supra*, I need not and do not decide whether respondent can make out a prima facie case for the substantive relief sought. *See supra* note 21.

IV.

I am also exercising my discretion to deny respondent's motion to reopen on the independent ground that he knowingly and intelligently waived any claim that he might have had to asylum and withholding of deportation.

In my judgment, at least in this particular case, the interests in the integrity of the administrative process and finality of decision should prevail over whatever interest respondent has in withdrawal of his calculated waivers because of an unfavorable decision, which was clearly foreseeable at the time.[38]

Respondent expressly conceded deportability and withdrew his claims to asylum and withholding of deportation on September 12, 1986. He did so on the record, through counsel, in response to a direct question from the immigration judge as to whether he intended to waive these

claims. *See* discussion *supra* at [49a-50a]. By any standard, respondent's decision was an intentional relinquishment of any right to claim asylum relief from deportation. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Further, it was a knowing waiver. It was calculated in an attempt to avoid extradition directly to the United Kingdom under a treaty between the United States and the United Kingdom soon to be ratified. *See Doherty* v. *Meese*, 808 F.2d at 940. It appeared likely at the time that the United Kingdom would ratify its treaty with the United States, which could have provided for respondent's direct extradition to the United Kingdom, before any decision could be made on asylum or withholding of deportation. Facing imminent ratification of this treaty, respondent chose to leave the United States as quickly as possible, rather than risk direct extradition to the United Kingdom in the event the treaty were ratified. *See id.* (respondent "urgently want[ed]" to escape the effects of the then-pending Supplementary Treaty). When he chose to waive any claims to asylum and withholding of deportation to avoid the possibility of direct extradition to the United Kingdom, he assumed the risk that Attorney General Meese might deny deportation to Ireland; whatever risks to him that existed at the hands of the Irish; and the risk that the move then underway to obtain ratification of Ireland's treaty with the United Kingdom would prove successful.

This tactical decision by respondent was fully within his rights. However, when he made this decision, he assumed the risk that he would be denied his request to be deported to Ireland, and required to go elsewhere. *See* discussion *supra* at [65a-67a]. The fact that respondent's attempt to work the regulatory process to his advantage failed, should not, absent exceptional circumstances, relieve him of the consequences of the decisions made in the attempt

to work the process to his advantage.[39] The Supreme Court has observed that courts "cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide." *Johnson* v. *United States*, 318 U.S. 189, 201 (1943).[40] So here, respondent's tactical decisions should not be revocable merely because later events did not unfold as he wished. If we were not to give near-preclusive effect to an express waiver under circumstances such as exist here, the regulatory process could be manipulated at will by litigants making and withdrawing waivers *ad libitum*, at the expense of the fair and expeditious administration of meritorious deportation claims.

V.

I also deny the motion on the separate grounds that respondent would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation.

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[39] Respondent's concession of deportability and withdrawal of any claim to relief is analogous to a guilty plea. "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States* v. *Broce*, 109 S. Ct. 757, 762 (1989). *See also Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("A defendant is not entitled to withdraw his plea [of guilt] merely because he discovers long after [it] has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.").

[40] *See also United States* v. *Prince*, 533 F.2d 205 (5th Cir. 1976) (antitrust defendants not permitted to withdraw *nolo contendere* pleas, made after consulting counsel, when sentences proved harsher than expected).

1. I deny the motion to reopen to permit the claim of asylum because, in my view, respondent would not ultimately be entitled to this discretionary relief, *INS* v. *Abudu*, 108 S. Ct. at 912, even if he could now establish a prima facie case for such relief.[41]

The grant of asylum is discretionary with the Attorney General.[42] In my discretion, I would not grant the respondent asylum. First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Matter of Doherty*, Mem. Att'y Gen. at 7 (June 9, 1988). Deporting respondent to the United Kingdom would unquestionably advance this important policy. *See id.* at 6-7. Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. *Id.* at 7-8. Third, respondent knowingly and intentionally waived his claim to asylum, and for the reasons explained in Part IV, *supra*, I would not permit withdrawal of that waiver. Fourth, I believe that respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, *see* discussion *supra* at [46a-48a], suggest that he is not deserving of equitable relief.

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[41] Insofar as respondent also requests reopening to enable him to seek the nondiscretionary relief of withholding of deportation, I conclude, for the reasons set fourth *infra* at [83a-91a], that respondent is statutorily ineligible for that relief.

[42] *See INS* v. *Stevic*, 467 U.S. at 421 n.15, 426; *INS* v. *Cardoza-Fonseca*, 107 S. Ct. at 1219-20. The discretionary authority of the Attorney General is not restricted to the enumerated grounds which compel an INS district director to deny asylum. 8 C.F.R. § 208.8(f)(i)-(vi).

2. I also deny the motion for reopening to permit respondent to raise a withholding of deportation claim. Even assuming that respondent could sustain an argument that, upon deportation, his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion" within the meaning of 8 U.S.C. § 1253(h)(1), he would be ineligible, on two separate grounds, for nondiscretionary withholding of deportation under 8 U.S.C. § 1253(h)(2)(A), (C).

(a) Subsection 1253(h)(2)(C) provides that the prohibition on deportation in § 1253(h)(1) is inapplicable where "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." [43] By its terms, this subsection does not require the Attorney General to find that an alien has actually committed a serious nonpolitical crime, but merely to find that there are serious reasons for *considering* that an alien has committed such a crime. *See McMullen* v. *INS*, 788 F.2d at 596-99. In conferring this latitude on the Attorney General, the statute recognizes that cases involving alleged political crimes arise in myriad circumstances, and that what constitutes a "serious nonpolitical crime" is not susceptible of rigid definition. As one commentator has observed, "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the

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[43] This subsection, which was added to the Immigration and Nationality Act as part of the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1981), is based directly upon, and is intended to be construed consistent with, the United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1967), which incorporates by reference the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951). *See McMullen* v. *INS*, 788 F.2d 591, 594-95 (9th Cir. 1986).

function of characterization itself is . . . one in which political considerations will be involved." G. Goodwin-Gill, *The Refugee in International Law* 35 (1983).

In *McMullen* v. *INS*, 788 F.2d 591 (9th Cir. 1986), the court set forth an analytical framework for determining whether an alien has committed a "serious nonpolitical crime" within the meaning of section 1253(h)(2)(C). There must be a " 'close and direct causal link between the crime committed and its alleged political purpose and object.' " *Id.* at 597 (*quoting* G. Goodwin-Gill, *supra*, at 61). Additionally, the crime "should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or it is 'of an atrocious or barbarous character.' " *Id.* at 595 (*quoting* G. Goodwin-Gill, *supra*, at 61). Both strands of this suggested analysis are satisfied here.[44]

It is the official position of the United States Government that the PIRA is a terrorist organization. United States Dep't of State, *Patterns of Global Terrorism: 1988* 33-34, 74-75 (1989) (identifying the PIRA as a terrorist organization);[45] *see also McMullen* v. *INS*, 788 F.2d at

[44] That respondent's extradition was denied on the grounds that the crime for which extradition was sought was a political offense under the Extradition Treaty then in force, *see Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270, has no bearing on the instant inquiry, which is a matter of statutory interpretation of 8 U.S.C. § 1253(h)(2)(C). *See McMullen* v. *INS*, 788 F.2d at 596-97.

[45] *See also* 20 Presidential Documents 775 (1984) (PIRA "has all the attributes of a terrorist organization"); 43 Cong. Q. 1388, 1389 (1985) (address by President Reagan); 84 State Dep't Bull. 12, 13, 15 (Dec. 1984) (Sec. Shultz) (U.S. joins U.K. and Irish government "in opposing any action that lends support to the Provisional IRA"); Staff of House Comm. on Foreign Relations, 101st Cong., 1st Sess., Country Reports on Human Rights Practices for 1988 at 1236-37 (Comm. Print 1989) (Reports submitted by Dep't of State) (PIRA admissions of terrorist activities); Affidavit of Assoc. Att'y Gen. Stephen S. Trott, sworn to Feb. 19, 1987, at para. 8 ("[i]t is the position of the United

597 ("the PIRA is unquestionably a 'terrorist' organization"). The INS has introduced substantial evidence that PIRA is a terrorist organization which commits violent acts against innocent civilians, *see Matter of McMullen*, Interim Dec. 2967 (BIA May 25, 1984). And the BIA has specifically found that the PIRA has engaged in "indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians who disagreed with the PIRA's objectives and methods." *Id.* (*quoted in McMullen* v. *INS*, 788 F.2d at 597).

In my view, there is substantial evidence that PIRA has committed terrorist activities directed at innocent, civilian populations. *See McMullen* v. *INS*, 788 F.2d at 597 (substantial evidence exists that PIRA committed "terrorist activities directed at an unprotected civilian population"). These "random acts of violence" against civilians constitute "serious nonpolitical crimes" for purposes of 8 U.S.C. § 1253(h)(2)(C). *Id.* at 598.

As the court held in *McMullen* v. *INS*, 788 F.2d at 599, I need not determine that respondent committed any of these unprotected crimes against the civilian population. "We are unmoved by the pleas of a terrorist that he should not in any way be held responsible for the acts of his fellows; acts that, by his own admission, he aided . . . and assisted . . . and otherwise abetted and encouraged." *Id.*[46]

States Government that the crimes committed by Doherty—hostage taking, murder, and assault with intent to commit murder—are terrorist offenses").

[46] Under general principles of conspiracy law, a co-conspirator is chargeable with any criminal act committed by another co-conspirator in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946). Respondent's membership in the PIRA makes him a co-conspirator in the PIRA's effort to overthrow British rule in Northern Ireland by violent means, and hence responsible for any

I need only find that there is "probable cause" to believe that respondent committed such crimes. *Id.*

In *McMullen,* the court held that conduct remarkably similar to respondent's was sufficient to establish probable cause to believe that the petitioner had committed some of PIRA's unprotected nonpolitical crimes. The relevant passage bears quotation at some length:

> McMullen admits that he was an active member in the PIRA, that he trained its members and participated in unlawful arms shipments as well as bombings of military installations. With regard to the PIRA itself, there is no question that it has undertaken terrorist activities directed at civilian targets in a manner

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nonpolitical crimes his co-conspirators commit in pursuit of that objective. The "PIRA's random acts of violence against the ordinary citizens of Northern Ireland and elsewhere" are "exhaustively documented in the record" of the *McMullen* case. *McMullen* v. *INS,* 788 F.2d at 598. Moreover, the BIA has found that

> the PIRA is a clandestine, terrorist organization committed to the use of violence to achieve its objectives . . . [and has engaged in] . . . attacks on both government civilian institutions and military installations, random violence against innocent civilian populations through indiscriminate bombing campaigns, the murder or maiming of targeted individuals for political reasons based on their public opposition to the PIRA, and the use of violence to maintain order and discipline within the PIRA's membership . . . . Its operations have been funded, in part, through the commission of thousands of armed robberies.

Matter of McMullen, Interim Dec. 2967, slip op. at 4-5 (BIA May 25, 1984) (citations omitted), *aff'd on other grounds,* 788 F.2d 591 (9th Cir. 1986). Based on these judicial and administrative findings, I of course have serious reasons to consider that PIRA members have committed serious nonpolitical crimes in the course of their conspiracy, and thus to conclude that respondent, as a co-conspirator, can be held responsible for committing crimes of such a character, even if he personally did not perform them.

> unprotected as a political offense. We conclude that the "totality of the circumstances," *cf. Illinois* v. *Gates,* 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 543 (1983), which include McMullen's willing and material involvement in a terrorist organization that carried out acts of violence against civilians, his assistance in training members of that organization and procuring arms shipments, support the BIA's conclusion that there are "serious reasons" to believe that McMullen committed some of these unprotected, serious nonpolitical crimes.

788 F.2d at 599. Here, as with the petitioner in *McMullen,* there clearly is the requisite probable cause to believe respondent has committed unprotected crimes. Respondent is a longstanding active member of the PIRA. *See* discussion *supra* at [46a-48a] and *infra* at notes 47, 53. He has admittedly committed violent acts in furtherance of the purposes of the PIRA. Like the petitioner in *McMullen,* respondent has provided the PIRA with "the physical and logistical support" that enables this terrorist group to operate. *Id.* at 599.[47]

Respondent's membership and participation in, aiding of, and assistance to the PIRA is sufficient to constitute probable cause to believe that respondent has committed

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[47] Respondent readily admits

> the facts that [he] was an "admitted member" of the Irish Republican Army, that he was convicted of the murder of a British Army officer and other violent offenses, that he and seven other IRA volunteers escaped from prison in Northern Ireland, and that he is currently the subject of outstanding warrants of arrest in the United Kingdom are, pursuant to the opinion [by Judge Sprizzo] in *Matter of Doherty,* matters of public information and readily available to all, including immigration judges.

Brief for Respondent-Appellee Joseph Patrick Thomas Doherty, *supra* note 25, at 3 (footnote omitted).

unprotected criminal acts, and therefore sufficient basis upon which to conclude that there are "serious reasons" to believe that respondent has committed "serious nonpolitical crimes.' *McMullen* v. *INS*, 788 F.2d at 598.[48] Indeed, this may even be a stronger case for application of the exception than in *McMullen*, given the record evidence that respondent committed a murder; smuggled large quantities of explosives in a car hijacked by a PIRA unit; drove to an ambush site in a hijacked van, the driver of which was held captive; and took over a family-occupied house in a civilian, residential neighborhood for the purpose of ambushing a British army patrol. *See* Transcript of Respondent's Testimony at 773-74, 783-86 & 792-96, *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270 (S.D.N.Y. 1984) [hereinafter "Doherty Transcript"].[49] *Compare McMullen* v. *INS*, 788 F.2d at 592-93, 599.[50]

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[48] Attorney General Meese noted in his June 9, 1988 opinion that violence against military personnel in a democratic society is unjustified, as is violence against civilians. Mem. Att'y Gen. at 6. Nothing herein is intended to suggest otherwise. It is not necessary for me to decide here whether violence against military personnel is alone sufficient to satisfy § 1253(h)(2)(C) because (1) respondent's other activities, together with his acts against British military personnel, are clearly sufficient; and (2) respondent's participation in violent acts against civilians is also alone sufficient.

[49] As the dissenting opinion in the BIA decision below pointed out, "it is fortuitous that the civilian hostages [taken by respondent and his associates] were uninjured in view of the fact that they were exposed to a gun battle." *Matter of Doherty*, No. A26 185 231, slip op. at 4 (BIA Nov. 14, 1988) (Morris, B.M., dissenting).

[50] Apart from the *McMullen* analysis, I determine that there are "serious reasons for considering" the offenses indisputably committed by respondent, *see, e.g.*, discussion *supra* note 47, to be "serious nonpolitical crimes" within the meaning of § 1253(h)(2)(C). These crimes standing alone involved disproportionate threats to civilian life and property.

(b) Respondent also has "assisted, or otherwise participated in the persecution of . . . person[s] on account of . . . political opinion," rendering him ineligible for withholding of deportation under 8 U.S.C. § 1253(h)(2)(A). *See McMullen* v. *INS*, 788 F.2d at 600 (Goodwin, J., specially concurring). Respondent is a member of the PIRA, an organization that the BIA found has killed or attempted to kill those who politically oppose its activities.[51] Moreover, as a PIRA officer, respondent was admittedly responsible for distributing arms and gathering ammunition, Doherty Transcript, *supra* at [88a], at 726, and he engaged in training and drilling other PIRA members. *Id.* at 734. These facts establish by ample evidence that respondent would be ineligible for withholding because of his participation in the PIRA's persecution of political opponents.

Again, it is not necessary for me to find that respondent was directly and personally involved in any of the PIRA's attacks on political targets. *See, e.g., McMullen* v. *INS*, 788 F.2d at 600 (Goodwin, J., concurring).[52] Respond-

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[51] *See Matter of McMullen*, Interim Dec. 2967 (BIA May 25, 1984) (PIRA engages in the murder or maiming of target individuals for political reasons based on their public opposition to the PIRA; among these targeted individuals was Ross McWhirter, founder of the *Guinness Book of Records*, for whose death the PIRA claimed "credit").

[52] *Cf. Kulle* v. *INS*, 825 F.2d 1188, 1192-93 (7th Cir. 1987) (almost identical language to 8 U.S.C. § 1253(h)(2)(A) held not to require proof of individual participation); *Schellong* v. *INS*, 805 F.2d 655, 661 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). *See also United States* v. *Osidach*, 513 F. Supp. 51, 72 (E.D. Pa. 1981) ("under § 13 of the [Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009], mere willing membership—without proof of personal participation in acts of persecution—in a movement that persecute[s] civilians is sufficient to warrant a finding of ineligibilty [for admission into the United States] as a displaced person"); *but cf. Laipenieks* v. *INS*, 750 F.2d 1427, 1431 (9th Cir. 1982).

ent's active roles in arming and training the PIRA, coupled with his willing membership in that organization, the length of his service in it, and the rank he attained,[53] more than suffice to show that he "assisted" the PIRA's political persecutions under the statute. Even if membership in the PIRA, standing alone, would be insufficient to bar respondent from relief under § 1253(h)(2)(A), *see Matter of Rodriguez-Majano,* Interim Dec. 3088 (BIA Sept. 28, 1988), respondent's activities on behalf of the PIRA fairly implicate him in those persecutions.[54]

Additionally, § 1253(h)(2)(A) reaches persons who have "otherwise participated in" persecution, even if they have not "assisted" in the persecution. This broad language covers forms of collaboration that are not otherwise cap-

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[53] In his extradition trial, respondent testified:

> I held several [PIRA] staff positions in Long Kesh [prison], from the section leader, company staff, officer's position. I was a company quartermaster, a company training officer, a company drill sergeant—well, we call them a drill officer. You call them in the United States Army drill Sergeants. I was in charge of the men in the yard and military formation, etc. After that I was a company—my God, I was everything—a company finance officer, and the highest rank that I have ever held inside the company was the company adjutant. I was the second in command of a company of 78 men.

Doherty Transcript, *supra* at [88a], at 734.

[54] Respondent reads *Rodriquez* to make the INS's persecution argument "frivolous." Respondent's Brief, *supra* note 11, at 27 n.19. But *Rodriquez* holds only that those who are members of opposing forces in a civil war are not ineligible for withholding of deportation or asylum as political persecutors if they inflict harms arising as the natural consequence of civil strife (*e.g.*, burning automobiles). The instant case, however, involves a terrorist group's particularized attempts to destroy targeted civilian political opponents.

tured by the Act, and undoubtedly extends to respondent's activities.[55]

On either of the above bases, respondent is not entitled to withholding of deportation.

CONCLUSION

For the foregoing reasons, the decision of the BIA is disapproved, and the respondent's motion to reopen these proceedings is denied.

/s/ DICK THORNBURGH
Dick Thornburgh
Attorney General

Date: June 30, 1989

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[55] General principles of conspiracy law again underscore this conclusion. *See supra* note 46. The statute's broad reference to those who "otherwise participate" in political persecutions is fairly read to encompass those individuals whose co-conspirators engage in political persecutions in furtherance of the conspiracy.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board Immigration Appeals

File: A26 185 231—New York

Date: Nov. 14, 1988

IN RE: JOSEPH PATRICK THOMAS DOHERTY
A.K.A. JOSEPH REILLY, A.K.A. HENRY J. O'REILLY

IN DEPORTATION PROCEEDINGS
MOTION

Oral Argument: August 17, 1988

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of service: J. Scott Blackman
Assistant District Director

CHARGES:

Order: Sec. 241(a)(1), I&N [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(9), I&N Act [8 U.S.C. § 1182(a)(9)]—Crime involving moral turpitude

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(10), I&N Act [8 U.S.C. § 1182(a)(10)]—Convicted of two or more crimes with aggregate sentences to confinement of five years or more

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)]—Entered by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(27), I&N Act [8 U.S.C. § 1182(a)(27)]—Entered to engage in activities prejudicial to the public interest

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(28)(F), I&N Act [8 U.S.C. § 1182(a)(28)(F)]—A member of an organization that teaches the duty or necessity of unlawfully assaulting or killing officers of an organized government.

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]—In the United States in violation of law

APPLICATION: Motion to reopen

On September 19, 1986, the immigration judge found the respondent deportable on his own admissions under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), for having entered in February 1982, by fraud and without a valid immigrant visa.[1] The

[1] The immigration judge specifically ruled only that the respondent was deportable because he was excludable under section 212(a)(20),

respondent was ordered deported to the Republic of Ireland (Eire) the country designated by the respondent pursuant to section 243(a) of the Act, 8 U.S.C. § 1253(a), and to the United Kingdom and Colonies in the alternative. The respondent declined to apply for asylum or withholding and conceded deportability in the expectation of being returned to Eire. The Immigration and Naturalization Service appealed contending that the immigration judge should have made findings on all of the grounds of deportability charged against the respondent and that the respondent should not have been ordered deported to Eire, as deportation to Eire would be prejudicial to the interests of the United States. 8 U.S.C. § 1253(a). The Board of Immigration Appeals dismissed the Service appeal on March 11, 1987. On May 22, 1987, a Service motion to supplement the record or to remand for the consideration of additional evidence was denied upon reopening by the Board. The Board's decision of May 22, 1987, was certified to the Attorney General at the request of the Commissioner of the Immigration and Naturalization Service on May 29, 1987. Subsequently, on December 3, 1987, the respondent filed a motion to reopen proceedings to allow him to apply for asylum and withholding of deportation and to redesignate the country of deportation. The respondent alleged that the passage of a law allowing his extradition from Eire to the United Kingdom was a changed circumstance justifying reopening proceedings to allow him to apply for asylum. The respondent further filed a motion for the Attorney General to recuse himself in this case. The Board also referred the respondent's motions to the Attorney General.

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but the transcript makes clear that he found the respondent deportable because he was excludable under section 212(a)(19) also (Tr. at 39).

On June 9, 1988, the Attorney General denied the respondent's motion to recuse and upheld the Board's determination that the immigration judge was not obliged to allow the Immigration and Naturalization Service to prove each charge of deportabiity, but he determined that the Service had shown that the deportation of the respondent to Eire would be prejudicial to the interests of the United States. He remanded the respondent's motion to reopen to the Board for its decision. We are informed that the Attorney General's decision has been appealed to the Court of Appeals for the Second Circuit. Oral Argument on the motion to reopen was held before the Board on August 17, 1988. The respondent's motion to reopen will be granted.

The statute provides that:

> The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. 8 U.S.C. § 1253(a).

An alien who is seeking withholding of deportation from any country must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act,

8 U.S.C. § 1253(h)(1); *INS* v. *Stevic,* 467 U.S. 407 (1984). In order to make this showing the alien must establish a "clear probability" of persecution on account of one of the listed reasons.

To be eligible for a grant of asylum, an alien must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). Section 208 of the Act. That is that he is unable or unwilling to return to his country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS* v. *Cardoza-Fonseca,* ____ U.S. ____, 107 S. Ct. 1207 (1987). In *Matter of Magharrabi,* Interim Decision 3028 (BIA 1987), we held that the asylum applicant has established a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act.

Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. 8 C.F.R. §§ 3.8; 103.5(a). No motion shall be granted unless the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. §§ 3.2, 242.22.

An alien may request that an exclusion or deportation proceeding be reopened pursuant to 8 C.F.R. § 103.5 or 8 C.F.R. § 242.22 respectively, on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. 8 C.F.R. § 208.11.

A motion to reopen to apply for relief under 8 C.F.R. § 242.17, including withholding of deportation, will not

be granted if respondent's right to make such an application was fully explained to him and he was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. 8 C.F.R. § 242.22.

No motion to reopen for the purpose of affording an alien an opportunity to apply for any form of discretionary relief, i.e., asylum, may be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. 8 C.F.R. §§ 3.2, 242.22.

The respondent originally argued that the motion should be granted because the Service had delayed the deportation of the respondent so that the law in Eire has changed allowing the respondent to be returned to the United Kingdom where he alleges he will be persecuted. Therefore, he argued, he should be allowed to change his designation of a country of deportation. Furthermore, he now argues, the Attorney General has determined that the respondent should not be allowed to choose Eire as the country of deportation, but should be deported to the United Kingdom. Consequently, he should be allowed to apply for asylum and withholding of deportation from the United Kingdom.

The Service maintains that the respondent's motion fails to meet the requirements of the regulations in that no asylum application was filed with the motion. Further, the Service maintains that the respondent has not explained adequately his failure to file an asylum application at the hearing before the immigration judge, and that he has failed to show new evidence which would be presented at the hearing on remand. The Service argues that the decision of the Attorney General ordering the respondent de-

ported to the United Kingdom is not new evidence because the respondent knew at the hearing the Service objected to the designation of Eire and wanted to deport him to the United Kingdom. Further, the Service alleges that the respondent has failed to make a prima facie case of a well-founded fear of persecution in the United Kingdom. According to the Service, the evidence submitted in support of the motion regards general conditions and does not relate to the respondent. Also, the motion should be denied as the respondent is excludable under 243(h) of the Act because he committed serious crimes outside the United States and for the same reason asylum would be denied as a matter of discretion.

Although the right given by the statute to designate a country of deportation is a substantive right, *Rodriguez-Agustin* v. *INS,* 765 F.2d 782 (9th Cir. 1985), there is no absolute right to withdraw a prior designation of a country of deportation. *Riasati* v. *INS,* 738 F.2d 1115 (10th Cir. 1984); *Wong Kam Cheung* v. *INS,* 408 F.2d 35 (2d Cir. 1969). Regardless of the merit of the respondent's first argument that a change of law in the Republic of Ireland is sufficient reason to reopen proceedings, we find that the respondent has shown he should be allowed to apply for asylum.

At the time of the hearing the reasonable expectation of the respondent was that he would be deported to Eire. The likelihood of his being deported to the United Kingdom appeared remote. Normally, the respondent would be deported to the alternate country of deportation only if the country named by the respondent refused to accept him or did not reply to the Attorney General's inquiry as to whether it would accept him. 8 U.S.C. § 1253(a). He had received assurances that he would be admitted to Eire from representatives of that government. Consequently, he withdrew his request for asylum, conceded deportability, and applied for no relief. Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable. If the respondent were expected to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum to any country to which he might remotely be deported, if he had a fear of returning there.

In addition, the Attorney General's decision of June 1988 disallowing the respondent's choice of a country of deportation constitutes changed circumstances which have arisen since the hearing. The fact that the respondent is now scheduled to be deported to the United Kingdom is undoubtedly new evidence which could not have been presented at the deportation hearing. Further, the respondent has submitted recently published background evidence which we find to be material to the respondent's case. We are not concerned that an asylum form did not accompany the motion because the respondent had already submitted a Form I-589 in connection with his earlier application (Tr. at 7-9). *See* 8 C.F.R. § 3.22(b). The respondent has submitted an affidavit and other additional evidence in support of his motion setting forth the facts to be proved at the reopened hearing.

In order to reopen proceedings the respondent would have to show a prima facie claim of a well-founded fear of persecution. We find that the evidence submitted by the respondent, if unrebutted, is sufficient to meet that burden and, also, that the motion should be granted in the exercise of discretion. The respondent has not been accused of any violations of law in the United States other than his illegal entry. At least one United States court has found that his crimes in the United Kingdom were politi-

cally motivated. *In Re Doherty,* 599 Fed. Supp. 270 (S.D.N.Y. 1984). The Service has alleged that the respondent has engaged in conduct which renders him either ineligible for withholding or unworthy of the benefit of asylum. The Service will have the opportunity to prove its allegations upon reopening of the proceedings.

Accordingly, the motion to reopen will be granted.

ORDER: The motion to reopen to apply for asylum and withholding of deportation is granted.

/s/ DAVID L. MILHOLLAN
For the Board

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board Immigration Appeals

File: A26 185 231—New York

Date: Nov. 14, 1988

IN RE: JOSEPH PATRICK THOMAS DOHERTY

DISSENTING OPINION: James P. Morris, Board Member

I respectfully dissent.

I would not reopen these proceedings to permit Mr. Doherty to apply for asylum and withholding of deportation to the United Kingdom.

It is well established that a motion for reopening deportation proceedings should be granted only upon the showing of prima facie evidence that the movant is eligible for the relief sought. *Matter of Lam*, 141 I&N Dec. 98 (BIA 1972). The majority opinion finds that such a prima facie claim has been shown, but it provides no analysis whatsoever as to how that conclusion was reached.

It is clear that if deported to the United Kingdom the respondent will face punishment. He has been sentenced to life imprisonment after having been convicted of murder. Such punishment would not constitute persecution under the immigration statutes. In connection with his motion to reopen, the respondent has submitted reports suggesting that young men suspected of being members of the armed opposition in Northern Ireland may have been killed by security forces rather than being arrested and charged with specific offenses. An Amnesty International report submitted by the respondent reflects that that organization is "concerned" that the killings may have resulted from a deliberate policy. This concern does not rise to the level of prima facie evidence that the respondent has a basis for a

well-founded fear of persecution. Moreover, the respondent has been convicted for murder and sentenced to imprisonment for life. Therefore, the respondent faces a long period of incarceration, and the British security forces would have no reason to take any further action to eliminate him as a threat to security. I don't find the affidavit submitted by the respondent's mother to be sufficient to support a motion to reopen. The affidavit details difficulties that her family has encountered with the British security forces. Her claim that the actions described were taken against her family because of their religion and political opinion is an unsupported conclusion. She stated for example, that her daughter was arrested and charged with murder. However, she was released because insufficient evidence was produced at trial to support a conviction. Trial and acquittal are hardly indicative of persecution. Mary Doherty's affidavit also fails to mention that the respondent is a member of the Provisional Irish Republican Army (PIRA) or that he has engaged in violent activities in support of that organization. She does not deny that other members of her family may also be involved in such activities or that the British security forces may have good reason to suspect that they are or have been so involved. We have held that it is not persecution under the immigration statutes for the government of a country to investigate and detain individuals suspected of aiding or being members of a guerrilla organization. *Matter of Maldonado-Cruz*, Interim Decision 3041 (BIA 1988). In view of the likelihood that the British security forces have reason to suspect members of Mary Doherty's family of being involved in criminal activities, which the affidavit does not deny, her unsupported conclusion that they have been abused because of their religion or political views is insufficient to warrant reopening.

For these reasons, I find that the motion to reopen should be denied for failure to make a prima facie showing that the respondent has a well-founded fear of persecution in the United Kingdom.

The majority also holds that reopening is warranted in the exercise of discretion. It is in this regard that I most emphatically disagree. The only reason given by the majority for its conclusion is that Doherty has not been accused of any violations of law in the United States other than his illegal entry, and the fact that the federal judge in Doherty's extradition proceedings found that his crimes in the United Kingdom were politically motivated. This simplistic approach totally ignores several factors, discussed below, which clearly relate to the appropriateness of a favorable exercise of discretion with respect to reopening. Further, it is insufficient merely to conclude that at a reopened hearing the Service will have an opportunity to prove that the respondent is unworthy of the benefit of asylum. These deportation proceedings began in 1983. This is a very significant case with substantial impact on the national interests of the United States, and it should be concluded promptly. Further proceedings which contemplate a possible grant of asylum or withholding of deportation to this terrorist and convicted murderer are not warranted.

The majority expresses concern about the changed circumstances resulting from the Attorney General's decision that the respondent should be deported to the United Kingdom. It is stated that his failure to seek asylum with respect to possible deportation to the United Kingdom is excusable and that he should now be provided a hearing in which he can attempt to show that he would be subject to persecution in the United Kingdom. In *Matter of Gonzalez*, Interim Decision 3071 (BIA 1988), the Board held that it was inappropriate to pretermit an asylum applica-

tion on the basis that the applicant had ben convicted of a particularly serious crime and that asylum would be denied in the exercise of discretion. The Board held that under the statutes and regulations the asylum applicant is entitled to a full evidentiary hearing. The rationale of *Matter of Gonzalez, supra*, does not apply here because what we have before us is a motion to reopen deportation proceedings, not an initial deportation proceeding. The applicable case here is *INS* v. *Abudu*, 485 U.S. ____, 108 S. Ct. 904 (1988). In that case the Supreme Court said that the Board has discretion to deny a motion to reopen even if the alien has made a prima facie case. The court specifically rejected an argument that this rule does not apply in asylum cases.

The Supreme Court went on to point out that motions to reopen are disfavored because there is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their cases. The court also said that an alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen. The majority certainly has not imposed a heavy burden on Doherty in his effort to have his proceedings reopened.

I am inclined to believe that the majority was overly influenced by *Matter of Gonzalez* because the decision of the majority does not seriously address the issue of discretion. As I have noted, the majority points to the fact that the respondent has not been accused of any violations of law in the United States other than his illegal entry. The respondent's lack of criminal activity in this country is of no significance whatsoever. It is his criminal activity in the United Kingdom that needs to be examined to determine whether he merits consideration of his asylum application in a new hearing. The majority has refused even to consider that criminal record despite the extremely serious nature of the crimes which he has admitted committing and for which he had been convicted. Noting the fact that a federal judge is of the opinion that the crimes were political in nature is not responsive to the Board's obligation to determine whether or not reopening of deportation proceedings is warranted as a matter of discretion. We have a responsibility to examine the respondent's criminal record and decide whether the crimes for which he has been convicted are so serious that we should not countenance a grant of asylum even if the respondent is able to prove at a reopened hearing that all of the allegations made in support of his motion to reopen are true.

I am persuaded that Doherty is a terrorist and a member of a terrorist organization. Accordingly, I believe that it would be detrimental to the interests of the United States either to provide a refuge for him in this country or to fail to deport him to the United Kingdom.

In *Matter of McMullen*, Interim Decision #2967 (BIA 1984), this Board found that the Provisional Irish Republican Army is a clandestine, terrorist organization committed to the use of violence to achieve its objectives. The respondent has admitted his membership in the PIRA and his participation in its violent activities. He stands convicted of the murder of a British officer in a premeditated armed attack. The court in *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), held that Doherty was not extraditable because his crime was political in nature. The court pointed out that the attack was against military personnel and that the civilian hostages taken by Doherty and his associates were not harmed. Of course, it is fortuitous that the civilian hostages were uninjured in view of the fact that they were forcibly exposed to a gun battle. The court also suggested that its decision may have been different if the crime involved a bombing which resulted

in the death or injury of innocent civilians. Yet, it must be remembered that Doherty has also been convicted of transporting explosives for the PIRA. It is well known that the PIRA has used explosives on a number of occasions in which innocent civilians were killed or injured. Doherty cannot escape responsibility for such activities simply because he has not been convicted of placing the bombs for explosion or because the specific explosives that he transported cannot be traced to a particular bombing scene. In *McMullen, supra*, the Board held McMullen accountable for violence committed by the PIRA because of his role in coordinating the shipment of arms from the United States to the PIRA in Northern Ireland. Doherty's activities are equally blameworthy. In any event, in considering this motion we are not constrained by the provisions of the extradition statutes and treaties.

Finally, I am in complete agreement with the decision of the Attorney General of June 9, 1988. At page 6 of that decision the Attorney General stated as follows:

> The facts established in the extradition proceedings show that respondent killed a member of the British army. While the victim was a soldier rather than a civilian, the use of violence against a democratic society is unjustified irrespective of the identity of the victim. It is unjustified for the fundamental reason that in a democratic society the political system is available for peaceful redress of grievances. Given the availability of peaceful alternatives, there is no legitimate reason to resort to violence against any person whether or not that person has an official status within the State.

For the foregoing reasons, I find the respondent unworthy of a favorable exercise of discretion in granting the motion to reopen or in granting relief at a reopened proceeding. In addition to the respondent's unworthiness, I would consider the effect of a new hearing and possible relief on our national interests. The Attorney General, in his decision of June 9, 1988, pointed out that it would be injurious to the national interests of the United States to provide the respondent a haven where he can avoid responsibility for his terrorist activities in the United Kingdom. The Attorney General said that it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. I agree with and support that policy. I concur with the Attorney General in accepting the assessment of the State Department that failure to return Doherty to the United Kingdom could undermine that government's confidence in the ability of the United States to cooperate in counter-terrorism efforts of the two countries. Accordingly, I would deny the motion to reopen in the exercise of discretion, and because of respondent's failure to make a prima facie showing of a well-founded fear of persecution.

/s/ JAMES P. MORRIS
James P. Morris
Board Member

I concur in the foregoing dissenting opinion.

/s/ FRED W. VACCA
Fred W. Vacca
Board Member

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board Immigration Appeals

File: A26 185 231—New York

Date: Nov. 14, 1988

IN RE: JOSEPH PATRICK THOMAS DOHERTY

SPECIALLY CONCURRING OPINION: Michael J. Heilman, Board Member

I respectfully concur.

The dissent provides two major reasons for denying this motion to reopen, that the motion should be denied in the exercise of discretion, and that Mr. Doherty's claim of persecution fails on the merits. Neither proposition appears to me to be so indisputable that reopening should be denied.

If only what the dissent states had any relevance to the outcome of this motion. American asylum law is in a sorry state indeed, and the dissent only tells part of the story.

Many persons who have engaged in violence, or who have been accused of engaging in violence, have been granted asylum in the United States by the very Department of Justice and the very Immigration and Naturalization Service which have so strenuously tried to deport Mr. Doherty. Federal courts which have considered asylum claims by the Dohertys of the world have consistently ruled in their favor. It may well be that this Board has consistently ruled against the grant of asylum to "terrorists," but the Department of Justice has in every case acquiesced in judicial decisions which have reversed the Board on this issue.

The dissent finds that Mr. Doherty should not be granted asylum in discretion because he was involved in violent criminal activities. It relies on this Board's decision

in *Matter of McMullen*, Interim Decision 2967 (BIA 1984) for the proposition that the "PIRA" is a "terrorist" organization committed to the use of violence to force the British Government to withdraw from Northern Ireland. The dissent also cites *Matter of Maldonado-Cruz*, Interim Decision 3041 BIA (1988) for the proposition that the British Government has the right to seek out and punish persons who are involved in violent guerrilla activities.

The dissent does not cite for obvious reasons the numerous judicial decisions which clearly are at odds with the Board, and in which the Attorney General has acquiesced. The most recent and pointed example is a decision of the Ninth Circuit in which former Associate Attorney General, now Judge Trott, joined, *Blanco-Lopez* v. *INS*, No. 87-7060 September 29, 1988. In that decision, it was held that a Salvadoran national who had been arrested for suspected gun-running to Salvadoran guerrillas, was entitled to asylum on that ground *alone*, because the Salvadoran "security forces believed him to be a guerrilla and attempted to persecute him for it."

What is the difference between a Salvadoran guerrilla and Mr. Doherty, between the PIRA and the Salvadoran "FMLN," or any of its five guerrilla sub-groups? They are all engaged in a violent political struggle. They are all being sought by the governments they are attacking. They are all loosely described as "Marxist" or "leftist".

Indeed, it bears noting that the United States pours substantial sums of money into El Salvador to help the Government of El Salvador fight those same guerrillas decisions like *Blanco-Lopez* v. *INS*, hold are persecuted by the Government of El Salvador. The United States has committed itself to the defense of the Salvadoran Government economically and politically also, and even provides military advisors. One would assume from this that

American security and foreign policy interests are under greater assault by Salvadoran guerrillas than they are by the PIRA.

So where is the difference between Mr. Doherty and a Salvadoran guerrilla? In the Attorney General's decision quoted by the dissent it is said that the "use of violence against a democratic society is unjustified irrespective of the identity of the victim." I have expressed the same view in similar words, but how relevant are these words when compared to the *actual* decisions being made in asylum cases in this country? The British Government is described as "democratic" by the same U.S. Department of State which describes the Government of El Salvador as "democratic." *See*, Country Reports on Human Rights Practices for 1987, Department of State, Joint Committees of the Senate and House of Representatives, 100th Congress. 2d Sess. at 485,1074 (El Salvador "is a representative democracy"; Great Britain enjoys a "democratic political system.")

Surely the difference is not that the Government of El Salvador has been criticized for political repression, limitations on civil liberties and police brutality, and the British Government has not. A perusal of the most recent Country Reports would disabuse one of that notion, as would a reading of the materials provided by Mr. Doherty in support of his motion.

Is the difference that Mr. Doherty is Irish and the Salvadoran guerrillas are not? Is this a basis for distinction for the exercise of discretion? Do we consider British lives dearer than those of Salvadorans and Americans who have been killed or harmed by the Salvadoran guerrillas? Is it a question of the British Government being more sensitive, or perhaps, that the Government of El Salvador has not yet realized that the Government of the United States

unaccountably both helps it fight the guerrillas and grants them asylum?

That this practice of granting asylum to members of "terrorist" organizations is entirely common-place may also be seen in a recent decision enjoining the Immigration and Naturalization Service from certain practices in the treatment of Salvadoran nationals. *Orantes-Hernandez* v. *Meese*, 685 F.Supp. 1488, 1511 (C.D. Cal. 1988). There, the court enjoined the Service from telling class members, among other things, that "asylum is *only* available to guerrillas or soldiers." Paragraph (d), of the order. (Emphasis added.)

But it is perhaps a bit misleading to discuss Salvadoran guerrillas and thereby leave the impression that this practice of granting asylum to "terrorists" is confined to that nationality. This Board has seen cases where asylum was granted to persons of other nationalities as well, whose claim was founded solely on the assertion that a government was after them for actual or suspected involvement in guerrilla or terrorist activities. This has occurred, for example, with applicants from India, Sri Lanka, Guatemala, and Ghana. The first two countries are generally described as democracies and the United States maintains friendly relations with them, as well. In a very recent Indian case, in fact, the Department of State recommended a grant of asylum, in its advisory opinion stating it was "important to note" that the applicant was a member of an "extremist" organization which had engaged in violence.

The dissent addresses none of these cases, and cannot, because they all show the speciousness of denying asylum to Mr. Doherty because he is a "terrorist".

As to the merits of the asylum claim, both the dissent and the Service are on even weaker ground. Every pub-

lished judicial decision on the grant of asylum to "guerrillas" or "terrorists" has held that a government persecutes a person by seeking him out for politically motivated violence. In effect, and in contrast to the dissent's and the Service's views, "political asylum" in the United States *has* come to be *completely* equitable with the "political offense exception" applied in extradition cases. It is not irrelevant, therefore, that Mr. Doherty has been found to be entitled to the benefit of the "politial offense exception."

I have already mentioned the most recent judicial holding on the eligibility for asylum of a suspected Salvadoran gun-runner. It might be useful to point out that the Board in dismissing the appeal in that case, had specifically held that the Government of El Salvador had the legitimate right to seek out persons engaged in guerrilla activities, and cited what the Board though were relevant Ninth Circuit decisions on that subject. The court did not even refer to those decisions in reversing the Board, obviously having found those prior decisions so irrelevant as to not require comment.

In another decision material to the merits of this asylum claim, the Ninth Circuit held that an actual, admitted Salvadoran guerrilla who had engaged in countless bombings and armed robberies, and who was sought by the Government of El Salvador for that reason alone, was entitled to asylum because he was a member of a "persecuted political organization," the "Front for Popular Liberation," a major Salvadoran guerrilla organization. *Garcia-Ramos* v. *INS*, 775 F.2d 1370 (9th Cir. 1985). In *Aviles-Torres* v. *INS*, 794 F.2d 441 (9th Cir. 1986), the court held, again without murmur from the Department of Justice, that a person described as a "guerrilla" in a newspaper article had established a claim of persecution as to the Government of El Salvador.

In short, while it may be true that this Board has held that a person suspected of being, or who actually is, a guerrilla engaged in violence against his government, is not persecuted for that reason, judicial decisions on this subject have consistently held otherwise, and the Immigration and Naturalization Service and the Department of Justice as a whole have acquiesced in those decisions. As this is so, it is not at all clear to me that the dissent's position on this subject is the interpretation of the asylum laws that is actually applied as a general rule. There is also the stark fact that the Department of Justice in its various agencies, and of its own volition, does grant asylum to persons thought to have engaged in "terrorist" activities, whatever the "policy" may be in the abstract.

Likewise, it seems to me that *Matter of McMullen* aside, the weight of opinion is in favor of Mr. Doherty as to whether he is ineligible for a grant of asylum on the ground that he was a member of an organization which engaged in the persecution of others, under section 243(h)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(A). In *Garcia-Ramos* v. *INS, supra*, it was undisputed that the respondent was a member of a guerrilla organization and had engaged in armed robberies and bombings. The Service there did not argue that he was barred from a grant of asylum for his activities or those of his guerrilla group.

In a decision issued a little more than a month ago, this Board expressly rejected the idea that an admitted member of a Salvadoran guerrilla organization was barred from a grant of asylum. *Matter of Rodriguez*, Interim Decision ____ (BIA September 28, 1988). There, we recognized that violent acts incidentally directed at the overthrow of a government, or committed in defense of that government in time of civil war, are not acts of persecution.

The Service's further contention that Mr. Doherty is barred from withholding of deportation for having commited a "particularly serious crime" within the meaning of section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253(h)(2)(B) appears equally misplaced. This provision has uniformly been interpreted to apply to crimes committed within the United States, and not to relate to offenses committed outside the United States. See, *e.g.*, *Matter of Carballe,* Interim Decision 3007 (BIA 1986).

As to the Service's contention that Mr. Doherty is ineligible for a grant of withholding of deportation under section 243(h)(2)(C) of the Act, 8 U.S.C. § 1253(h)(2)(C), that provision specifically requires the Service to establish that his offenses cannot be defined as "nonpolitical crimes". There has already been a definite if not necessarily definitive finding by a United States District Court that Mr. Doherty's offenses fall within the "political offense" exception to extradition. *In re Doherty*, 599 F. Supp. 270 (S.D. N.Y. 1984). It would seem that the Service is continuing an argument that understandably failed when it was previously attempted.

It is therefore clear to me that in every major respect, the views and analysis provided in the dissenting opinion and by the Service may well have no relevance whatsoever in the adjudication of this motion to reopen and the underlying application for asylum and withholding of deportation. They appear to be contradicted fundamentally in actual practice and application and are purely theoretical objections.

The Service may oppose this motion to reopen; what it has not done is provide any cogent distinction between Mr. Doherty's case and that of the Salvadoran guerrillas, and others who have been granted asylum in the United States openly in the last several years.

The only difference I can detect is that of nationality. This is no basis on which to deny asylum in discretion, and is certainly no basis on which to apply a different legal theory of what constitutes an act of persecution.

/s/ MICHAEL J. HEILMAN
Michael J. Heilman
Board Member

APPENDIX D

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

In re: Joseph Patrick Thomas Doherty (A26-185-231)

IN DEPORTATION PROCEEDINGS

Under 8 U.S.C. 1253(a), an alien is to be deported to a country designated by the alien if that country is willing to accept him "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." In this case, the Board of Immigration Appeals (BIA) ruled that there was insufficient evidence that the deportation of respondent to the Republic of Ireland (Ireland) was prejudicial to the interests of the United States and accordingly rejected the request of the Immigration and Naturalization Service (INS) that respondent be deported to the United Kingdom of Great Britain and Northern Ireland (the United Kingdom). Pursuant to C.F.R. 3.1(h)(1)(iii), I granted the INS's request to review the decision of the BIA. For the reasons set forth below, I disapprove the BIA's decision and conclude that it would be prejudical to the interests of the United States for respondent to be deported to Ireland and that he should be deported instead to the United Kingdom.

I.

Respondent is a citizen of both Ireland and the United Kingdom. He was convicted in the United Kingdom in 1981 of murder, attempted murder, and possession of

firearms and ammunition with intent to endanger life or cause serious injury to property. These charges arose out of an incident in which respondent and other members of the Provisional Irish Republic Army ("PIRA") ambushed a British army convoy. One of the soldiers was killed during the attack. Prior to this sentencing, respondent escaped from prison and fled to Ireland and then to the United States, which he entered illegally in 1982.

Respondent was arrested by the INS in 1983. The United States, acting on behalf of the United Kingdom, instituted proceedings to extradite him to that country. The district court, however, held that his actions involving the ambush of the British army patrol and escape from prison fell within the political offenses exception to the extradition treaty between the United States and England, and thus denied the request for extradition. *In Re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

Respondent's deportation proceeding had been stayed during the pendency of the extradition litigation. When it resumed, respondent conceded his deportability at a hearing before the immigration judge on the basis of having entered without valid immigration documents, 8 U.S.C. 1251(a)(1), 1182(a)(19), (20), and designated Ireland as the country to which he wished to be deported.[1] INS objected to Ireland as the country of deportation on the ground that deportation there would be prejudicial to the

[1] INS had added several other grounds for deportation, 8 U.S.C. 1182(a)(9), (10), (27), (28)(F)(ii). These charges deal with criminal conduct, either actual or potential. INS requested that it be allowed to prove these additional charges. The immigration judge declined, holding that since respondent had conceded deportability, there was no point in proving that he was deportable on additional grounds. This holding was affirmed by the BIA. BIA Decision of March 11, 1987 at 3.

interests of the United States, and contended that he should instead be deported to the United Kingdom. In support of this contention it supplied the immigration judge with newspaper articles and speeches on the general issue of terrorism. Although INS was given a continuance of one week to produce further evidence to support its contention, it failed to submit any additional evidence.

On the basis of this record, the immigration judge held that respondent should be deported to the country he had designated, Ireland, as INS had failed to produce any evidence that deportation to Ireland would be prejudicial to the interests of the United States. INS appealed this decision to the BIA, arguing that respondent's deportation to Ireland would be prejudicial to the interests of the United States. On March 11, 1987, the BIA affirmed the decision of the immigration judge, stating:

> [W]e are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion. The Service was granted a continuance to allow it to secure evidence of such interest, but it has produced none.

BIA Decision of March 11 ("March Decision"), at 5.

When it issued this opinion, the BIA was unaware that on March 4 INS had filed a Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Judge (Motion).[2] The Motion contained an affidavit from Associate Attorney General Trott, signed on February 19, 1987, stating that in his judgment the

[2] INS had filed the Motion with the BIA on March 5, but it was apparently lost or misfiled due to administrative error. BIA opinion of May 22, 1987, at 3.

deportation of respondent to Ireland would be prejudicial to the interests of the United States.

After the BIA had issued its March Decision, the INS successfully moved the BIA to reopen the appeal for consideration of its Motion. The BIA declined, however, to remand the case to the immigration judge, holding that the affidavit did not constitute previously unavailable evidence as required by BIA's regulations, 8 C.F.R. 3.2, 3.8. BIA Decision of May 22, at 3-5. In addition, the BIA stated that "the affidavit does not purport to be based upon evidence that respondent's deportation to the Republic of Ireland will be prejudical to the United States' interests. Rather, it appears to be based only upon the . . . logical inference" that our allies would view respondent's deportation to Ireland as shielding a terrorist from punishment. *Id.* at 5.[3]

[3] Counsel for respondent was notified that the Attorney General would be reviewing the decision of the BIA, and would determine whether the deportation of respondent to Ireland would be prejudicial to the interests of the United States and whether, instead, he should be deported to the United Kingdom. Counsel for respondent was given the opportunity to submit a memorandum addressing the question under review. Counsel for respondent was also informed that the Attorney General would be considering Mr. Trott's affidavit in the course of his review of the BIA's decision, and thus that respondent might wish to respond to the facts and reasoning contained in that affidavit. Counsel for respondent filed a memorandum, as well as a shorter supplemental letter in response to a subsequent letter from INS setting out its views on the case. In my review I have considered these filings made by counsel for respondent and INS, the record of the proceedings below, Mr. Trott's affidavit, the decision in the extradition proceedings cited in Mr. Trott's affidavit, and a letter from Michael H. Armacost, Undersecretary for Political Affairs at the Department of State, setting forth the Department of State's views regarding the interests of the United States in this case.

II.

Respondent was notified that the Attorney General would consider only whether respondent's deportation to Ireland would be prejudicial to the interests of the United States and whether, instead, he should be deported to the United Kingdom. Nonetheless, in his memorandum, respondent raises the issue of the Attorney General's authority to review the BIA's decision. Respondent appears to contend that the Attorney General lacks the power to overturn the BIA's decision, particularly if he were to do so after having considered Mr. Trott's affidavit. Given that respondent has raised the issue, it is appropriate, before turning to the merits, to address the scope of the Attorney General's decisionmaking authority in this case.

Section 1253(a), like most other provisions of the immigration law, vests the power to make determinations in the Attorney General personally.[4] That power includes the power to receive evidence, make findings of fact, and decide issues of law. The Attorney General has delegated his decisionmaking authority, in the first instance, to the BIA and the immigration judges.[5] They exercise "such discretion and authority conferred upon the Attorney General by [law] as is appropriate and necessary for the disposition" of the case. 8 C.F.R. 3.1(d)(1), 236.1. Thus, to the extent that the immigration judges or the BIA have

[4] See generally 8 U.S.C. 1103.

[5] The BIA is entirely a creation of the Attorney General. *See Greene* v. *INS*, 313 F.2d 148 (9th Cir.), *cert. denied*, 374 U.S. 828 (1963). Immigration judges receive some of their powers and duties directly from Congress, 8 U.S.C. 1252(b), and some by delegation from the Attorney General. *See Lopez-Telles* v. *INS*, 564 F.2d 1302 (9th Cir. 1977).

authority to make determinations under section 1253(a), including the authority to receive evidence and make findings of fact, it is because they are exercising, by delegation, the Attorney General's authority.

Although he has delegated his decision-making authority in the first instance to the immigration judges and the BIA, the Attorney General has retained the authority to review the decisions of the BIA pursuant to 8 C.F.R. 3.1(h), and thus has retained final decision-making authority. *Id.* 3.1(d)(2). The regulations setting out his review authority do not expressly or by implication circumscribe the Attorney General's statutory decision-making authority. Thus, when the Attorney General reviews a case pursuant to 8 C.F.R. 3.1(h), he retains full authority to receive additional evidence and to make de novo factual determinations.[6]

Accordingly, there can be no doubt that the Attorney General has authority to consider evidence such as Mr. Trott's affidavit even though that evidence was not considered by the BIA or the immigration judge. Nor can there be any doubt that the Attorney General has authority to reach a decision different from that of the BIA. In any event, in this case respondent was notified that the Attorney General would consider Mr. Trott's affiadavit and was given an opportunity to respond on the merits to the

[6] Moreover, despite the contention of respondent, the regulations governing the BIA are not applicable to the Attorney General. Thus, even after having rendered a decision, if the Attorney General was presented with a motion to reconsider, or a motion to remand as the BIA was, he would not be governed by 8 C.F.R. 3.2 and 3.8 in deciding that motion.

facts and reasoning contained in it, an opportunity which respondent has exercised.[7]

III.

Respondent's actions and his criminal convictions were established by the district court in the extradition proceeding. *In Re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). Respondent did not contest the factual findings of the court; indeed, he testified at length as to the events giving rise to his criminal conviction. *Id.* at 272. Respondent's

[7] On April 21, 1988, respondent filed a motion requesting that the Attorney General, and any individual to whom he might delegate decisionmaking authority, be recused from an adjudicative role in these proceedings. Respondent does not allege any personal bias as the basis for this motion. Rather, in essence the motion is based on the allegation that the history of the extradition litigation and these deportation proceedings demonstrates that the Justice Department is persecuting respondent by advancing improper legal theories and denying him procedural rights. This does not appear to be, in fact, a "recusal" motion; rather, the motion appears to me to be a repetition of legal arguments that respondent has made in these proceedings and elsewhere.

In any event, respondent's allegation is wthout foundation. The Justice Department has in no way persecuted respondent by advancing improper legal theories or denying him procedural rights. In this connection, I would note that, in an interim review of these proceedings, the United States Court of Appeals for the Second Circuit has already rejected a number of the claims that respondent makes in this motion. In particular, it held that it was "abundantly clear" that the INS had a reasonable basis for appealing the adverse decision of the immigration judge, and it also rejected the argument that the determination of the district court that respondent was not extraditable in some way precluded his deportation. *Doherty* v. *Meese*, 808 F.2d 938, 942, 944 (2d Cir. 1988). Accordingly, respondent's motion is denied.

testimony and his criminal convictions as established in the extradition proceeding are summarized in the opinion of the district court:

> Respondent Doherty was a member of the provisional Irish Republican Army ("PIRA"). On May 2, 1980, at the direction of the IRA, Doherty and three others embarked upon an operation "to engage and attack" a convoy of British soldiers.
>
> Doherty testified that he and his group took over a house at 371 Antrim Road in Belfast, and awaited a British Army convoy. Some three or four hours later, a car stopped in front of 371 Antrim Road and five men carrying machine guns emerged. These men, members of the Special Air Service of the British Army ("SAS"), and Doherty's group fired shots at each other.
>
> In the exchange of gunfire Captain Herbert Richard Westmacott, a British army captain, was shot and killed. Doherty was arrested, charged with the murder, among other offenses, and held in the Crumlin Road prison pending trial. On June 10, 1981, after the trial was completed but before any decision by the Court, Doherty escaped from the prison along with seven others. He was convicted in absentia on June 12, 1981 of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization.

599 F.Supp. at 272 (citations to transcript omitted).[8]

[8] Mr. Trott's affidavit states that respondent has committed certain additional crimes. Respondent states that he has not committed such crimes. I do not consider it necessary to resolve this factual dispute.

The facts established in the extradition proceedings show that respondent killed a member of the British army. While the victim was a soldier rather than a civilian, the use of violence against a democratic society is unjustified irrespective of the identity of the victim. It is unjustified for the fundamental reason that in a democratic society the political system is available for peaceful redress of grievances. Given the availability of peaceful alternatives, there is no legitimate reason to resort to violence against any person whether or not that person has an official status within the State.[9]

The availability of such alternatives cannot be questioned here. While in some cases the question whether a society is democratic would be a difficult one, it is clear that the United Kingdom (of which Northern Ireland is a part) is a democratic society. Its citizens have fundamental political rights and are fully able to pursue their political goals through the electoral process.

It is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. The factual premise of Mr. Trott's affidavit is that this policy would be prejudiced if respondent were deported to Ireland because, while he could be prosecuted there for any crimes he committed in connection with his escape from prison,

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The record of the extradition proceeding establishes the fact that respondent has committed serious crimes. I base my decision on the facts established in the extradition proceedings, and do not consider it relevant whether or not respondent has committed additional crimes.

[9] This, of course, is not to say that the United States may not also condemn acts of violence in a non-democratic state. In particular, it is the policy of the United States to condemn acts of violence directed against non-combatants even by those who are otherwise legitimately seeking to oppose a non-democratic government.

he could not be prosecuted there or extradited to the United Kingdom for murder or the other offenses he committed in connection with the ambush of the British army patrol. Trott Affidavit at 4-5, paragraphs 9, 11. This factual premise is challenged by respondent, who asserts that he would be subject to extradition from Ireland to the United Kingdom, apparently after having served any sentence Ireland would impose with respect to his escape from prison in the United Kingdom. Brief of Respondent-Appellee Joseph Patrick Thomas Doherty To The Attorney General at 24-25 (January 8, 1988).

Respondent apparently bases his statement that he would be subject to extradition from Ireland to the United Kingdom on the Extradition Act recently promulgated in Ireland.[10] Assuming for purposes of this decision that Irish law supports respondent's contention, it would nonetheless be prejudicial to the interests of the United States for respondent to be deported to Ireland rather than the United Kingdom for two independent reasons. First, respondent has committed serious crimes in the United Kingdom and has received a prison sentence in the United Kingdom. As indicated above, it is the policy of the United States that those who commit acts of violence against a democratic state should receive swift and lawful punish-

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[10] I note that the affidavit of counsel attached to the Motion of Respondent to Reopen or Reconsider (December 3, 1987), which as discussed in the next section of this opinion, was referred to me by the BIA, states that the Extradition (European Convention on the Suppression of Terrorism) Act went into effect in Ireland on December 1, 1987, and that it changed the Irish law governing deportation such that respondent would now be subject to extradition from Ireland to the United Kingdom. Affidavit of Mary Boresz Pike (December 3, 1987) at paragraphs 25-27.

ment, and it is thus in the interests of the United States that respondent serve his sentence in the United Kingdom. Deporting respondent to Ireland would require the United Kingdom to invoke Irish law to secure respondent's return to the United Kingdom. It is in our interest that he be sent directly to the United Kingdom instead.

Second, Michael H. Armacost, the Undersecretary for Political Affairs at the Department of State, has communicated to me the views of the Department of State that a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom. Mr. Armacost states:

> We note in particular that the United Kingdom is the only State which has requested Doherty's extradition from the U.S., and that the denial of that request by our courts met with great disappointment. Additionally, Her Majesty's Government has repeatedly and vigorously expressed its desire that the United States effect Doherty's deportation to the United Kingdom; to our knowledge, no other State has made a competing request. Therefore, in our view, the government and people of the United Kingdom would not welcome a decision by the Attorney General to deport Doherty elsewhere.
>
> Moreover, the United Kingdom is the United States' closest partner in our counter-terrorism efforts. Failure to return Doherty to the United Kingdom could undermine HMG['s] confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern.
>
> Finally, given the strength of British views on this issue, we believe that an Executive Branch determination not to deport Doherty to the U.K. might well prejudice broader aspects of our bilateral relationship beyond cooperation in counter-terrorism activities.

I certainly agree with the State Department that a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom.[11]

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[11] Respondent points to the fact that he was held unextraditable under the United States-United Kingdom Extradition Treaty. Brief of Respondent-Appellee at 3-4. Deportation proceedings such as these, however, are independent from, and governed by a different standard than, extradition proceedings. *Doherty* v. *Meese*, 808 F.2d 938, 944 (2d Cir. 1986). Application of the extradition treaty involves an interpretation of the reciprocal legal obligations created by that treaty; the application of 8 U.S.C. 1253(a) involves a determination of the interests of the United States—potentially a much broader inquiry. Thus, the fact that respondent's actions were held to fall within the political offenses exception to the then applicable extradition treaty between the United States and the United Kingdom does not preclude a finding that it would be prejudicial to the interests of the United states for respondent to be deported to Ireland.

Respondent also asserts that he has a substantive right to be deported to the country he designates, and that denial of that right would violate his constitutional right to due process and equal protection. Brief of Respondent-Appellee at 18-23. This latter claim is based on his assertion that he is the first alien whose country of designation has been rejected. Respondent is, of course, correct that 8 U.S.C. 1253(a) authorizes an alien to designate a country of deportation, but he fails to acknowledge that the statutory authorization is subject to the authority of the Attorney General to reject the designated country. Nor has he been singled out unconstitutionally. In the analogous area of decisions whether or not to exercise prosecutorial discretion, a decision to prosecute is only unconstitutional if it is based on a characteristic such as race or religion. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *Wayte* v. *United States*, 470 U.S. 598, 608, (1985). Respondent does not assert that he has been singled out based on such a characteristic, nor would there be any grounds for him to do so.

For the foregoing reasons, I conclude that deportation of respondent to Ireland would be prejudical to the interests of the United States and that he should be deported instead to the United Kingdom. Accordingly, I disapprove the decision of the BIA affirming the order of the immigration judge that respondent be deported to Ireland rather than the United Kingdom.[11]

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[12] My decision on the merits is based on the evidence and reasoning set forth in Part III of this opinion. I express no opinion regarding the BIA's decision, pursuant to 8 C.F.R. 3.2 and 3.8, to deny INS's Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Judge. I do, however, disapprove of the BIA's statement that Mr. Trott's affidavit consisted soley of "logical inferences" and thus was not "evidence." May Decision at 5. The judgment under 8 U.S.C. 1253(a) whether an alien's designation of a country of deportation would be prejudicial to the interest of the United States "must be based on an analysis of the impact of a particular deportation on United States' interests viewed as a whole by a politically responsible official." *Doherty* v. *Meese, supra,* 808 F.2d at 943. Such an analysis is likely to take the form of an affidavit such as Mr. Trott's. Indeed, it is difficult to see what other kind of evidence could be offered. Certainly, the INS should not be required, for instance, to offer the affidavits of foreign government officials stating what the official position of their governments would be regarding a particular deportation, and stating whether they will lessen their cooperation with the United States as a result of the deportation proceeding.

Finally, I approve of the decision of the BIA that the immigration judge, in the circumstances of this case, did not abuse his discretion in refusing to let the INS prove additional charges. This refusal in no way impaired the INS's ability to establish that it would be prejudicial to the interests of the United States for respondent to be deported to Ireland. As the BIA stated: "Deportability and designation of the country for deportation are separate and distinct issues." March Decision at 5. Once deportability is established on any ground, as it was here, the INS can proceed to establish its objections to the country of

On December 3, 1987, respondent filed a motion with the BIA requesting an order reopening the deportation proceedings, and remanding the case to the immigration judge for a hearing on respondent's claims for asylum, withholding of deportation, and for redesignation of country of deportation. It appears that respondent's arguments are twofold: first, that the enactment of the Extradition Act in Ireland has changed the facts upon which he based his earlier concession of deportability and his waiver of other legal claims; and second, that because the prolongation of the administrative proceedings prevented him from being deported to Ireland prior to the entry into force of this law, he should be allowed now to revoke his earlier concession and waiver.

On February 2, 1988, the BIA issued a per curiam opinion refering respondent's motion to the Attorney General. BIA Opinion of February 2, 1988, at 2. In its opinion, the BIA stated it was taking this action because it was unclear whether it had authority to consider the motion while an appeal was pending before the Attorney General. Accordingly, the opinion referred the motion to the Attorney General "for such action as he deems appropriate." *Id.*

I have concluded that it is appropriate to remand this motion to the BIA for its decision. I express no opinion as to how the BIA should decide the motion, or as to how the immigration judge or the BIA should make any subsequent determinations in the event that all or part of that motion were to be granted. In light of the length of time that the respondent's deportation proceedings have already consumed, however, I do recommend that the BIA

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designation under 8 U.S.C. 1253(a). Of course even in circumstances similar to those here, the INS must be given the opportunity to prove when necessary additional *facts* that are relevant to its objection to a country of designation, but that need not be done by proving additional grounds of deportability.

give priority on its docket to this motion to the extent that, in the BIA's judgment, this can be done consistent with any applicable procedural rules and the reasonable requirements of the parties.

V

For the foregoing reasons, the decision of the BIA is disapproved, and the case is remanded to the BIA for proceedings consistent with this opinion.

/s/ EDWIN MEESE III
Edwin Meese III
Attorney General

Date: June 9, 1988

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 185 231 – New York

Date: Feb. 2, ____

IN RE: JOSEPH PATRICK THOMAS DOHERTY

IN DEPORTATION PROCEEDINGS
APPEAL

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of service: J. Scott Blackman
Assistant District Director

CHARGES:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(9), I&N Act [8 U.S.C. § 1182(a)(9)] – Crime involving moral turpitude

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(10), I&N Act [8 U.S.C. § 1182(a)(10)) – Convicted of two or more crimes with aggregate sentences of confinement of five years or more

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)] – Entered by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20) – I&N Act [8 U.S.C. § 1182(a)(20)] – No valid immigrant visa

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(27), I&N Act [8 U.S.C. § 1182(a)(27)] – Entered to engage in activities prejudicial to the public interest

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(28)(F), I&N Act [8 U.S.C. § 1182(a)(28)(F)] – A member of an organization that teaches the duty or necessity of unlawfully assaulting or killing of officers of an organized government.

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – In the United States in violation of law

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondent, through counsel, moves this Board to order the reopening of deportation proceedings before the immigration judge to provide him the opportunity to apply for asylum and withholding of deportation and to permit the redesignation of the country of deportation. The Board's May 22, 1987, decision in this case, however, is presently under review by the Attorney

General under the provisions of 8 C.F.R. § 3.1(h)(1)(iii). It is unclear whether the Board has authority to consider a motion to reopen under these circumstances. This is particularly true where the motion involves issues that may be related to those under consideration by the Attorney General (*e.g.*, the request to reopen proceedings to permit the redesignation of the country of deportation). Accordingly, consideration of this motion will not be undertaken by the Board and the motion and Service's response will be forwarded to the Attorney General for such action as he deems appropriate. Respondent's request to the Board for time within which to submit a response to the Service's reply brief will be included in the record.

/s/ DAVID L. MILHOLLAN
Chairman

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 185 231 – New York

Date: ____ 22, ____

IN RE: JOSEPH PATRICK THOMAS DOHERTY

IN DEPORTATION PROCEEDINGS
MOTION

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of service: J. Scott Blackman
Assistant District Director

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)] – Entered by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20) – I&N Act [8 U.S.C. § 1182(a)(20)] – No valid immigrant visa

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(9), I&N Act [8 U.S.C. § 1182(a)(9)] – Crime involving moral turpitude

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(10), I&N Act [8 U.S.C. § 1182(a)(10)) – Convicted of two or more crimes with aggregate sentences of confinement of five years or more

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(27), I&N Act [8 U.S.C. § 1182(a)(27)] – Seeking to enter to engage in activities prejudicial to the public interest

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(28)(F), I&N Act [8 U.S.C. § 1182(a)(28)(F)] – A member of an organization that teaches the duty or necessity of unlawfully assaulting or killing of officers of an organized government.

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – In the United States in violation of law

APPLICATION: Remand

This case is before us on motion of the Immigration and Naturalization Service (hereafter the Service) to reopen its appeal for consideration of its March 4, 1987, Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Court. We will reopen the appeal on our own motion to consider the Service's motion to remand of March 4, 1987. The motion will be denied and our order of March 11, 1987, will be affirmed.

The facts and history of this case are set forth in our order of March 11, 1987, and will not be repeated here except as necessary for this decision. The respondent is a citizen of the Republic of Ireland and the United Kingdom of Great Britain. He has a long record of association with the Provisional Irish Republican Army (PIRA), and has a number of criminal convictions. On May 2, 1980, while on a mission for the PIRA, he was involved in a gun battle during which a British Army captain was killed. The respondent was tried and convicted for murder, attempted murder, possession of firearms and ammunition, and belonging to a proscribed organization. He was sentenced to two terms of life imprisonment plus 30 years. On June 10, 1981, he escaped from custody using weapons that had been smuggled into the jail. He entered the United States in February of 1982 using a passport in the name of Henry J. O'Reilly. The Government of Great Britain attempted to extradite him, but the United States District Court of the Southern District of New York denied extradition.[1]

At a hearing on September 12, 1986, the respondent admitted a number of the allegations against him, conceded deportability on 2 of the charges, and designated the Republic of Ireland as the country of deportation. The Service objected to the respondent's designation of the country of deportation. It contended that deportation to the Republic of Ireland was improper as it would be prejudicial to the interests of the United States within the meaning of section 243(a) of the Act, 8 U.S.C. § 1253(a), as it may interfere with the United States' international efforts to combat terrorism.

The immigration judge granted the Service 2 continuances to allow it to obtain evidence to support its objections. The Service indicated that this matter was of concern at the highest levels of government (Tr. at 47). However, when the hearing reconvened on September 19, 1986, the Service had nothing further to submit. The immigration judge entered his decision, and the Service appealed. In an order dated March 11, 1987, we dismissed the Service's appeal.

[1] The history of the litigation in this case is set forth in our order of March 11, 1987.

However, on March 5, 1987, prior to our decision, the Service submitted a MOTION TO SUPPLEMENT THE RECORD OR TO REMAND FOR FURTHER PROCEEDINGS BEFORE THE IMMIGRATION COURT (hereafter motion to remand). Due to administrative error, that motion was not included in the record and was not considered by the Board. Therefore, we will reopen on our own motion and now consider the Service's motion to remand.

As it was filed while the appeal was pending before the Board, the Service's motion is a motion to remand. In reviewing motions to remand, we apply the standards applicable to motions to reopen. The regulations provide that a motion to reopen "shall *not* be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. . . ." 8 C.F.R. § 3.2. The motion "*shall state the new facts* to be proved at the reopened hearing and *shall* be supported by affidavits or other evidentiary material." 8 C.F.R. § 3.8 (emphasis supplied). The motion will not be granted "when a *prima facie* case of eligibility for the relief sought has not been established." *INS* v. *Wang,* 450 U.S. 139 (1981); *Matter of Martinez-Romero,* Interim Decision 2872 (BIA 1981); *Matter of Radriguez,* 17 I&N Dec. 105 (BIA 1979); *Matter of Lam,* 14 I&N Dec. 98 (BIA 1972). *See Matter of Sipus,* 14 I&N Dec. 229 (BIA 1972).

The Service wishes to offer into evidence an affidavit sworn on February 19, 1987, by Stephen S. Trott, Associate Attorney General of the United States. The Service contends that this affidavit is newly obtained evidence which provides a basis for the Board to find that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States.

There are two aspects of this case that deserve special comment. The first is raised in the dissenting opinion in which it is stated that this Board does at times apply a generous standard in considering motions to reopen in visa petition cases. This is both true and hardly remarkable as the provisions of the immigration law relating to visa petitions require the Attorney General to approve an immigrant visa petition if the petitioner establishes eligibility. Section 204 of the Immigration and Nationality Act, 8 U.S.C § 1154. In such instances, the Board may be confronted with a situation in which, for reasons of administrative economy, it is far more efficient to remand the case, than to force the petitioner to file a new visa petition.

The motion to reopen under consideration here neither involves a visa petition, nor, to be quite frank, a typical deportation case. The Service wishes to reopen the proceedings to establish that Mr. Doherty's deportation to the Republic of Ireland would be prejudicial to the interests of the United States. This objection to the country of deportation designated by the immigration judge is highly unusual, even exceptional, as that word is commonly understood. The objection was apparently first raised on September 3, 1986, when Mr. Doherty indicated that he would concede his deportability and withdraw his applications for relief. At that time, the Service indicated that it needed more time to obtain an authoritative statement from a high government official which would establish the prejudice which might result from the designation of the

Republic of Ireland. Subsequently, on September 12, 1986, the Service reiterated, with some emphasis, that Mr. Doherty's case was enjoying the attention of certain high officials in the United States Government, including the Attorney General. In the case of the latter, the Service stated unequivocally that Mr. Doherty would receive the personal attention of the Attorney General that "coming week." September 12, 1986, (Tr. at 47).

On September 19, 1986, the Service informed the immigration judge that it had not been able to obtain any statement from a high official relating to Mr. Doherty, although the case was still "under review at the highest levels of the Justice Department." September 19, 1986, Tr. at 57. The immigration judge, satisfied that the hearing had been continued long enough, entered his decision finding Mr. Doherty deportable and ordering him deported to the Republic of Ireland. The Service appealed this decision to the Board, which dismissed the appeal on March 11, 1987.

We now have before us a motion to reopen based on a February 19, 1987, affidavit by the Associate Attorney General. He states his opinion that Mr. Doherty's deportation to the Republic of Ireland would be prejudicial to the interests of the United States because it is the policy of the United States to oppose terrorism.

The respondent contends that the motion must be denied because it does not establish that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. §§ 3.2 and 3.8; *Wang* v. *INS, supra. Matter of Reyes,* 18 I&N Dec. 249 (BIA 1982); *Matter of Martinez-Romero, supra.* The respondent contends that the regulations apply with equal force when it is the Service that desires reopening. *Ramon-Sepulveda* v. *INS,* 743 F.2d 1307 (9th Cir. 1984).

While there is no reason to treat the Associate Attorney General's statement lightly, the fact remains that the regulations under which this Board operates do not distinguish between government officials and private parties, as the respondent correctly contends. The Service's motion must be treated in the same manner as a motion filed by a respondent. If Mr. Doherty, for instance, were presently trying to change his designation of the country of deportation 5 months after he had made it, presumably the Service would be arguing vociferously that he would have to show that his motion was based on evidence previously unavilable or unknown.

In stating this premise, the Board is not adopting a mechanistic approach to the motion to reopen, it is applying a consistent approach. The Service has failed to establish that the affidavit from the Associate Attorney General was unavailable before February 19, 1987. Indeed, the Service's motion is completely silent as to the reasons for its submission at this late date. This is an especially telling omission in light of the fact that the Service had repeatedly represented to the immigration judge that Mr. Doherty's case was of great interest and under review at high government levels in September 1986. The glacial pace at which any tangible proof of this interest was produced seems to belie any sense of urgency or responsibility on the part of the government to proceed promptly in this case.

Therefore, we agree with the respondent that the Service's motion must be denied because of its failure to comply with the regulations. In this case, not only is there nothing showing that the proffered evidence was not available and could not have been discovered or presented at the hearing, but the affidavit is premised in part upon testimony given before a Senate committee in 1985.

Moreover, the affidavit does not purport to be based upon evidence that the respondent's deportation to the

Republic of Ireland will be prejudicial to the United States' interests. Rather, it appears to be based only upon the same logical inference argued by the Service at the hearing. The mere possibility that our allies will view the respondent's deportation to the Republic of Ireland as shielding a terrorist from punishment was of record when we reached our prior decision.

The second subject which bears further discussion is whether the Service should have been reasonably on notice that Mr. Doherty might designate the Republic of Ireland as the country of deportation. This is directly pertinent to the reasonableness of the Service's delay in obtaining the affidavit of prejudice. A review of the record shows that on February 25, 1985, Mr. Doherty asserted vehemently that he was a citizen of the Republic of Ireland, not of Great Britain. February 25, 1985, Tr. at 3. This unequivocal assertion was made approximately 18 months before Mr. Doherty conceded his deportability. It is obvious that the Service was on notice of Mr. Doherty's claim of citizenship for a substantial period of time. It should have been prepared to contest his designation of the Republic of Ireland before the September 5, 1986, hearing. Therefore, we also deny the motion in the exercise of discretion based upon the extraordinary delay in producing the affidavit and the Service's lack of preparation for the hearing.

Accordingly, the following orders will be entered.

ORDER: The proceedings are reopened for consideration of the Service's motion.

FURTHER ORDER: Upon further consideration, the Service's Motion to Supplement the Record or Remand for Further Proceedings Before the Immigration Court is denied.

FURTHER ORDER: The Board's prior order of March 11, 1987, is affirmed.

/s/ MARY MAGUIRE DUNNE
Acting Chairman

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 185 231 – New York

Date: _____

IN RE: JOSEPH PATRICK THOMAS DOHERTY

DISSENTING OPINION: JAMES P. MORRIS, Board Member

I respectfully dissent.

The majority denies the motion of the Immigration and Naturalization Service to remand because of (1) the Service's failure to comply with the regulations by showing that the affidavit by the Associate Attorney General now proffered was unavailable and could not have been discovered or presented at the hearing; and (2) it does not appear that the Associate Attorney General's opinion is based on evidence. Because I disagree with these reasons, I dissent.

In our order of March 11, 1987, we dismissed the Service's appeal because it produced no evidence that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States under section 243(a) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a). The Service has now offered such evidence in the form of an affidavit in which the Associate Attorney General states that it is the policy of the United States that those who commit terrorist offenses should not escape due punishment through international flight. He notes that the respondent has been convicted of terrorist offenses for which he will not be punished if deported to the Republic of Ireland. He states that the United States is

currently encouraging several foreign countries to arrest and surrender to us persons accused of acts of terrorism against citizens of the United States, including Abu Abbas, the mastermind of the *Achille Lauro* incident. He concludes that it would be prejudicial to the interests of the United States to be perceived as aiding a person who has committed terrorist offenses to escape punishment.

In *Doherty* v. *Meese,* 808 F.2d 938 (2d Cir. 1986), the United States Court of Appeals held that the decision whether to deport Doherty to the Republic of Ireland necessarily implicates the national interests of the United States and affects not only the relations of the United States with the United Kingdom and the Republic of Ireland, but also complicates multilateral negotiations to halt international terrorism. The Court further observed that the decision whether a respondent's deportation to a country designated by him would be prejudicial to the interests of the United States must be based on an analysis of the impact of a particular deportation on United States interests viewed as a whole by a politically responsible official.

The Associate Attorney General is a politically responsible official and is in a position to make this basically political determination. The Office of International Affairs in the United States Department of Justice is responsible for formulating and supervising the execution of international criminal justice enforcement policies and procedures. It also participates in the negotiation of international agreements and treaties relating to criminal law enforcement. This office reports through the Criminal Division to the Associate Attorney General. See the Annual Report of the Attorney General of the United States (1985) at pp. iv and 73-82. I find the Associate Attorney General's affidavit to be authoritative, material, and dispositive of the issue of whether the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States.

I believe that the majority has become entangled in the requirements of motion practice unnecessarily. The Board has already reopened these proceedings because of an administrative error. Therefore, the entire spectrum of options available to it in reviewing the appeal are again available. The Board is authorized by 8 C.F.R. § 3.1(d)(2) to return a case to the immigration judge for such further action as may be appropriate without entering a final decision on the merits of the case. It is clear, therefore, that the Board has considerable discretion in seeking to attain justice based upon its knowledge of available evidence. *Tandaric* v. *Robinson,* 257 F.2d 895 (7th Cir.), *reh'g denied* (1958). In *Matter of Martinez-Solis,* 14 I&N Dec. 93 (BIA 1972), the Board noted that a deportation proceeding is a quest for truth involving high stakes. It rejected the "sporting theory of justice" and affirmed its prior order remanding the case to the immigration judge for additional evidence. Further, it is not uncommon for the Board to remand a case for correction of an error or to allow submission of additional evidence or for consideration of some form of discretionary relief from deportation. The Board frequently remands visa petition cases on the basis of evidence submitted on appeal without a showing that the evidence could not have been discovered or presented in the proceedings before the district director. I do not recall any visa petition case which implicated national interests of the United States. However, this is a very significant case and important national interests are obviously involved. Moreover, additional material evidence is available. Therefore, I would remand on the Board's own motion for inclusion of the Associate Attorney General's affidavit.

Even assuming that motion standards are applicable here, I question the majority's decision to deny the motion for lack of a showing of the unavailability of the proffered affidavit. The record does not reflect that the Service was at fault in failing to obtain the affidavit. Despite two short continuances, the Service actually had only a few days in which to secure evidence in opposition to the respondent's designation of the Republic of Ireland as the country of deportation. The first indication in the record that the respondent would concede deportability and designate the Republic of Ireland as the country of deportation appears in the record of hearing for September 12, 1986, only 7 days before the immigration judge rendered his decision. Previousiy, the respondent had contested the government's every move against him. It is not surprising that the Service was unable to secure an affidavit from the Office of the Attorney General on such short notice. In any event, by now refusing to accept the affidavit on the ground that it could have been made available earlier, the majority appears to equate the Service with the Associate Attorney General and to punish the former because the latter did not act more expeditiously. Moreover, the potential damage here is not to the Service or the Associate Attorney General but is to United States' efforts to combat terrorism internationally. As the Associate Attorney General's affidavit did not exist before February 19, 1987; was not available to the Service until March 3, 1987; and was timely submitted by the Service on March 5, 1987; I would hold that the evidence was unavailable.

Accordingly, I would remand the case for receipt and consideration of the Associate Attorney General's affidavit on the Board's own motion, or in the alternative, I would grant the Service's motion to remand. At the remanded proceeding both the respondent and the Service

should be permitted to offer additional evidence and argument as to which country deportation should be directed.

/s/ JAMES P. MORRIS
James P. Morris
Board Member

I concur in the foregoing dissenting opinion.

/s/ DAVID L. MILHOLLAN
David L. Milhollan
Chairman

APPENDIX G

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A26 185 231 – New York

Mar. 11, 1987

IN RE: JOSEPH PATRICK THOMAS DOHERTY

IN DEPORTATION PROCEEDINGS
APPEAL

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of Service: J. Scott Blackman
Assistant District Director,
Deportation

Oral Argument: February 11, 1987

CHARGES:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(19), 8 U.S.C.

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20), 8 U.S.C.

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(9)

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(10)

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(27)

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(28)(F)

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – In the United States in violation of law

APPLICATION: Remand

In a decision dated September 19, 1986, an immigration judge found the respondent deportable under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), as one excludable at entry under section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20), for lack of a valid visa. The immigration judge also found the respondent deportable under sections 241(a)(1) and 212(a)(19) of the Act (Tr. at 39-40), but did not include that charge in his order. As the respondent conceded deportability for being excludable at entry under sections 212(a)(19) and 212(a)(20) and as we find that the finding of deportability on the 212(a)(19) charge was inadvertently omitted from his decision by the immigration judge, we find him excludable on that charge as well. The Immigration and Naturalization Service has appealed. The appeal will be dismissed.

The respondent is a 32-year-old single male, a native and citizen of the Republic of Ireland and the United Kingdom of Great Britain. He entered the United States in February of 1982 by presenting an Irish passport issued in the name of Henry J. O'Reilly and containing a United States non-

immigrant visa. he misrepresented himself to be Henry J. O'Reilly when he was in fact Joseph Patrick Thomas Doherty. He was taken into custody by the Service on June 17, 1983, and an Order to Show Cause was issued that day charging him with deportability under section 241(a)(2) of the Act for being in the United States in violation of law. However, custody was thereafter transferred to the United States Marshal's Service while the respondent was under proceedings to extradite him to the United Kingdom.

On December 12, 1984, Judge John E. Sprizzo denied extradition *In re Doherty,* 599 F. Supp. 270 (S.D.N.Y. 1984). The respondent was returned to the custody of the Immigration and Naturalization Service. An immigration judge set bond for the respondent's release at $200,000. However, we sustained the Service's appeal from that decision and ordered the respondent held without bond. On February 25, 1985, the Service lodged 6 additional charges of deportability. In early 1985 the Government sought collateral review of the decision denying extradition. On June 25, 1985, the Government's suit for a declaratory judgment was dismissed. *United States* v. *Doherty,* 615 F. Supp. 755 (S.D.N.Y. 1985). On March 13, 1986, that dismissal was affirmed by the United States Court of Appeals for the Second Circuit. A petition for rehearing was denied on June 2, 1986. *United States* v. *Doherty,* 786 F.2d 491 (2nd Cir. 1986). A petition for habeas corpus through which the respondent sought to compel his deportation was denied and then affirmed on appeal. *Doherty* v. *Meese,* 808 F.2d 938 (2nd Cir. 1986).

When the Government did not petition the Supreme Court for review in *United States* v. *Doherty, Id.,* within 90 days as permitted by 28 U.S.C. § 2101(c), the respondent advised the immigration judge that he wished to consent to deportation and withdraw his application for discretionary relief from deportation. A conference was held in connection with the deportation case on September 5, 1986. At a hearing on September 8, 1986, the Service requested a continuance, which was granted by the immigration judge. A hearing on the merits of the case was held on September 12, 1986. The respondent admitted allegations 1, 2, and 4 through 10[1] and conceded deportability (Tr. at 33-36). The respondent withdrew his application for asylum, made clear that he was requesting no relief from deportation (Tr. at 38), and designated the Republic of Ireland as the country of deportation.

The Service objected, stating that it desired to go forward and prove all the allegations and charges in the Order to Show Cause. It also objected to the respondent's designation of the Republic of Ireland as the country of deportation on the ground that the respondent's deportation there would be prejudicial to the interests of the United States. The Service took the position that the respondent was a member of the Provisional Irish Republican Army (PIRA), a terrorist organization, with a criminal record including convictions for the murder of a British Army officer, jail breaking, possession of a weapon, and membership in a proscribed organization, the PIRA. The Service contended that it should be allowed to prove all these facts to complete the record. The immigration judge saw no purpose to be served in allowing the Service to prove the remaining allegations and charges and refused to allow it.

In support of its contention that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States, the Service submitted as background information several documents including a copy of a speech by Secretary of State Shultz on October 25, 1984; a statement by Abraham D. Sofaer, Legal Ad-

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[1] Allegation 3 was superceded by allegation number 5.

viser, Department of State, given before the Senate Committee on Foreign Relations on August 1, 1985; and two newspaper articles. The attorney for the Service also advised that this matter is of concern at the highest levels of government and that it was under consideration at the Department of State and that Attorney General would personally review it the following week (Tr. at 47).

Over the respondent's objections, the immigration judge granted the Service a continuance until September 19th to allow it to produce evidence in support of its contention that the respondent's deportation to the Republic of Ireland would be prejudicial to the United States' interests.

The hearing was reconvened on September 19, 1986, and the Service advised that it had nothing further to submit. The immigration judge rendered his decision and the Service submitted a timely appeal. The respondent moved to have the record forwarded to the Board without a transcript and for summary dismissal of the appeal. *Matter of Torre,* Interim Decision 2954 (BIA 1984). On October 30, 1986, the immigration judge denied the motion to forward the appeal without a transcript and we deny the motion for summary dismissal.

On appeal, the Service contends that the immigration judge erred in refusing to allow the Service to adduce evidence and prove each and every allegation and charge in the Order to Show Cause. The Service contends that the allegations and charges are matters within the Service's prosecutorial discretion which neither the immigration judge nor this Board can review. *Lopez-Telles* v. *INS,* 564 F.2d 1302 (9th Cir. 1977); *Matter of Quintero,* 18 I&N Dec. 348 (BIA 1982); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980); *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978); *Matter of Merced,* 14 I&N Dec. 644 (BIA 1974); *Matter of Geronimo,* 13 I&N Dec. 680 (BIA 1971).

The Service also contends that the immigration judge erred in accepting the respondent's designation of the Republic of Ireland as the country for deportation. The Service submits that section 243(a) of the Act does not compel a decision that Doherty must be deported to the country of his choice. It is contended that the designation of the Republic of Ireland as the country of deportation has serious foreign policy implications for the United States. The Service states that in Ireland the respondent would face possible prosecution for his escape from jail, but not for his other offenses due to double jeopardy type provisions of Irish law. Further, he may be in a position to engage in further terrorist activities. The Service also submits that the respondent's deportation to the Republic of Ireland may well adversely impact our relations with other nations, especially the United Kingdom, with whom we have pledged mutual support in the fight against worldwide terrorism. It is contended that deportation of a terrorist convicted of murder to a country where he will escape the full consequences of his acts is certainly "prejudicial to the interest of the United States" within the meaning of section 243(a) of the Act (INS brief on appeal, p. 22).

The Service also contends that it was not permitted to prove that the respondent is a member of the PIRA; that he has been convicted of murder of a British Army officer and other violent offenses; that he escaped from lawful custody by force and violence and that he is currently the subject of outstanding warrants of arrest. The Service contends that the record is incomplete for a decision on whether the respondent's deportation to the Republic of Ireland is prejudicial without proof of these facts.

We find the Service's contentions to be without merit. An immigration judge is not empowered to review the Service's exercise of its prosecutorial discretion, but he is

not obligated to allow the Service to waste valuable time and resources proving superfluous charges and allegations. A respondent is no more deportable on 7 charges than on two. Therefore, after a respondent's deportability has been established, it is within the sound discretion of the immigration judge whether to allow the Service to submit additional evidence or arguments relevant to other charges or allegations. In this case, the respondent admitted 9 allegations of fact in the Order to Show Cause and conceded deportability on two charges. Further, he stated that he was applying for no relief from deportation. The immigration judge saw nothing to be gained from proof of additional charges of deportability and, despite the Service's appeal, neither do we.

The contention that proof of these additional charges was necessary for an informed decision on the Service's objection to the country of deportation designated by the alien is confusing. Deportability and designation of the country for deportation are separate and distinct issues. Further, the immigration judge gave the Service at least two continuances to prepare its case after the respondent had disclosed his position. The Service never offered any evidence relating to these matters in connection with its objection.

Turning now to the respondent's designation of the Republic of Ireland as the country of deportation, section 243(a) of the Act, 8 U.S.C. § 1253(a), in pertinent part provides:

> The deportation of an alien in the United States . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States . . .

The statute bestows upon a respondent the right to designate the country of deportation and this right is a substantive right. *Rodriguez-Agustin* v. *INS*, 765 F.2d 782 (9th Cir. 1985).

The respondent contends that an alien's designation of a country has never been rejected on the ground that deportation to that country would be prejudicial to the interests of the United States. The Service has not contested this assertion and we find no instance where it has happened. Although the statute authorizes rejection of the respondent's designation of the country for deportation, we are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion. The Service was granted a continuance to allow it to secure evidence of such interest, but it has produced none. The Service's trial attorney in effect placed himself in the role of testifying on this issue. The trial attorney's argument, however, is not evidence and there is nothing of record to reflect that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States.

Accordingly, the Service's appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ DAVID L. MILHOLLAN
Chairman

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New York, New York

File: A26 185 231

September 19, 1986

IN THE MATTOR OF: JOSEPH PATRICK THOMAS DOHERTY,
AKA JOSEPH REILLY, RESPONDENT

IN DEPORTATION PROCEEDINGS

ON BEHALF OF RESPONDENT:
Law firm of Pike and Somerstein
401 Broadway
New York, New York 10013
Mary Pike, Esquire of Counsel
Stephen Somerstein, Esquire of Counsel
Arthur Helton, Esquire of Counsel

ON BEHALF OF SERVICE:
Scott Blackman, Esquire
Allen Page,
Esquire of Counsel/INS
New York, New York 10278

CHARGE: Sec. 241(a)(1), in that at time of entry not in possession of any valid document by which to enter under Sec. 212(a)(20) of the Act.

APPLICATION: No application for relief.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male alien, a native of Northern Ireland and a citizen of the United Kingdom and Colonies. He entered the United States on or about February, 1982 and presented the passport of the Republic of Ireland issued in the name of Henry J. O'Reilly containing a U.S. non-immigrant visa. He misrepresented himself to be one Henry J. O'Reilly, when in truth and fact he was one Joseph Patrick Thomas Doherty; and it was conceded that he was not in possession of any valid immigrant visa or any entry document for permanent residence and it was his intention to remain indefinitely in the United States. He conceded his deportability and designated Eire as the country of deportation. The Service wished, as an alternate, the United Kingdom and Colonies to which the alien's representation had no objection.

The original Order to Show Cause was received in evidence on February 25, 1985 as Exhibit 1. On that same date additional allegations of deportability and charges of deportability were submitted and received in evidence as Exhibit 2. Contained in Exhibit 2 were allegations five through sixteen. The alien conceded the truth of allegations five through ten in addition to allegations one and two on the original Order to Show Cause (Exhibit 1). The alien conceded his deportability based on his concessions of the truth of allegations one, two, five through ten. In view of the fact that deportability was conceded the alien was prepared to designate a country of deportation. In order not to prolong the hearing and extend the record, I did not permit the Service to introduce any evidence on allegations eleven through sixteen.

The Service, in designating the United Kingdom and Colonies, placed the alien in the position of submitting an asylum application which apparently had been previously

considered by the Service, but, no such application was to be renewed before me. The alien's attorneys solely wished that the alien be deported to Eire; a designation of country which is permitted under Section 243(a) of the Immigration and Nationality Act.

The Service has tried to delay a decision by me, which seems relatively simple because the Service believes that it is not in the best interests of this country to deport the alien to Eire. The Service offered no actual evidence on this point but presented certain documents which I considered as part of a brief furnished to me as to why terrorism in the world is against the best interests of the United States and that this country should be protected against terrorism (Exhibit A). It was agreed by all parties that the lettered Exhibits would not be considered evidentiary and only the numbered Exhibits as such.

I've carefully reviewed the materials submitted by both parties, marked Exhibits A through E and am convinced that neither side has offered any evidence that Eire is a country which is opposed to the doctrine that was stated by the Service attorneys that world terrorism is inimical to their best interests. I assume that the Service, which asked for several adjournments to produce such evidence, would have presented that before me today, which I felt was a most reasonable period of time which the Government could have to present such evidence. I can find nothing in Section 243(a) or any other part of the Immigration and Nationality Act which would require me to render any decision other than to direct the alien's deportation to the country he designated, which right he has under Section 243(a). And there was nothing to indicate that the Attorney General believes that this is inimical to the best interests of the United States. No evidence was offered on that point.

ORDER

IT IS ORDERED that the respondent be deported to Eire on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if Eire advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to the United Kingdom and Colonies.

/s/ Howard I. Cohen
HOWARD I. COHEN,
Immigration Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-4084, -4092

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed June 29, 1990]

Present: HON. J. EDWARD LUMBARD, HON. WILFRED FEINBERG, and HON. GEORGE C. PRATT, *Circuit Judges.*

A petition for review of orders of the Attorney General of the United States.

This cause came to be heard on the certified list of items comprising the record and was argued by counsel.

UPON CONSIDERATION THEREOF, it is ordered, adjudged and decreed that the Petitions for review be and they hereby are granted in part, denied in part and remanded to the Board for further proceedings, consistent with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro

By: EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 88-4084

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed Sep. 13, 1990]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Respondent U.S. Department of Justice.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

/s/ Tina Eve Brier

By: TINA EVE BRIER,
Chief Deputy Clerk

APPENDIX K

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter–

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

2. Section 208 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158, provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child of alien granted asylum

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

3. Section 243(a) and (h) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253(a) and (h), provides in relevant part:

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon non-acceptance by country

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory.

* * *

* * * * *

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that –

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

4. 8 C.F.R. 3.2 provides in relevant part:

§ Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly au-

thorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

5. 8 C.F.R. 208.11 provides in pertinent part:

§ 208.11 Asylum requests after completion of exclusion or deportation hearing.

An alien may request that an exclusion or deportation proceeding be reopened pursuant to 8 CFR 103.5 or 8 CFR 242.22 respectively, on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

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Supreme Court, U.S.
FILED
JAN 25 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JOSEPH PATRICK DOHERTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review an interlocutory decision granting a motion to reopen when the uniqueness of the case will not permit a decision of general applicability and any decision by this Court will be mooted by new regulations the Attorney General is compelled to issue by May 28, 1991.

2. Whether the Court should review an interlocutory circuit court decision reversing the denial of a motion to reopen when the Attorney General has admitted that factors he relied on in denying the motion were not relevant considerations.

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No. 90-925

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JOSEPH PATRICK DOHERTY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF FACTS

The respondent, Joseph Patrick Doherty, respectfully requests that this Court deny the petition for a writ of certiorari.

For now more than seven years, the executive branch campaign to deliver the respondent to the United Kingdom has been unsuccessful. Decisions adverse to the

executive branch have punctuated the years of litigation. With each successive defeat, it has resorted to positions more aberrant.

The case's convoluted course, its unique history, and its peculiarly fact-specific nature are alone compelling reasons for denying the petition. We therefore present a detailed statement of the facts.

* * *

On June 18, 1983, Joseph Patrick Doherty was seized by FBI and INS agents pursuant to an INS order to show cause and warrant of arrest. C.A. App. 1-2.[1] Within ten days, he filed a request for political asylum. C.A. App. 4-13. He stated that he feared persecution in the United Kingdom and that his life would be in

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[1]"C.A. App." references are to the joint appendix in the Second Circuit. "App." references are to the appendix to the certiorari petition.

danger were he deported there. Ibid.

On June 28, 1983, the British government requested the respondent's extradition. The immigration judge immediately adjourned the deportation proceeding. It remained in abeyance until the extradition-related proceedings were finally decided. C.A. App. 45-46. The extradition litigation spanned three years and produced the decision in respondent's favor that the executive branch seeks yet to circumvent.

The Extradition Phase of the Litigation: Successive Losses for the Government.

The formal extradition request, filed on August 16, 1983, stated that the respondent had been convicted in Northern Ireland of murder, attempted murder, and possession of firearms and ammunition. It further alleged that he was wanted for offenses arising from the escape he and seven other IRA volunteers made from a

British prison in Belfast. Matter of Doherty by Government of the United Kingdom, 599 F.Supp. 270, 272 (S.D.N.Y. 1984).

U.S. District Court Judge John E. Sprizzo conducted the extradition proceeding. The evidentiary hearings consumed eight days. Witnesses testified for the government and for the respondent.

On December 12, 1984, the district court denied the extradition request, finding that the political character of the respondent's offenses barred his extradition. The decision defined very restrictively the nature of those offenses capable of qualifying as political.

Analyzing the respondent's conduct in the context of the voluminous evidence put forward, the judge concluded that the respondent's offenses were unquestionably political. He held that "the facts of this case present the assertion of the political offense exception in its most

classic form." Id. at 276.

On February 4, 1985, the executive branch filed a declaratory judgment action seeking a judgment declaring Joseph Doherty extraditable. Such action was unprecedented. United States v. Doherty, 786 F.2d 491, 500 (2d Cir. 1986). The district court dismissed for failure to state a claim. United States v. Doherty, 615 F.Supp. 755 (S.D.N.Y. 1985). The government's litigation posture prompted the district court to inquire "whether unlimited repetitions of judicially rejected contentions comport with the dignity of the United States Attorney's office." Id. at 760 n. 5.

The Second Circuit, in a unanimous decision, affirmed, observing that "Judge Sprizzo engaged in a careful analysis of the political offense exception." United States v. Doherty, 786 F.2d at 493-494. As to why the government pressed a posi-

tion the court termed "startling," as opposed simply to refiling the extradition request, the court stated that "it fears it may lose when it tries again[.]" Id. at 495, 500. The government's petition for rehearing was denied.

The Deportation Phase of the Litigation: Losses for the Government Before the Immigration Judge and the BIA.

When the executive branch did not petition for certiorari, the immigration proceeding resumed on September 5, 1986. Counsel for the respondent advised the immigration judge that the respondent conceded his deportability and would designate Ireland as his country of deportation, the right of designation being afforded by 8 U.S.C. 1253(a).

The respondent's Irish citizenship was not disputed (App. 4a, 46a, 116a, 141a, 149a), and the Irish government was willing to accept him. App. 98a-99a. The latter fact was known to the respondent,

the immigration judge, and the government and had been confirmed by a letter from the Irish vice-consul. C.A. App. 105, 127, 247-248, 258-259.

The respondent's designation of Ireland was entirely proper under the statute. Further, having already been in custody for more than three years, he had no incentive to delay. Through the designation, he sought only to avoid deportation to the United Kingdom, where he feared persecution.

Based on justifiable expectation that he would be deported to Ireland pursuant to his designation, the respondent withdrew his earlier-filed application for political asylum from the United Kingdom. App. 14a, 99a; and see C.A. App. 105, 113, 115. No deportee's designation had ever been disallowed on the ground of prejudice to the interests of the United States. The INS asserted that the respondent's

must be. It had never before raised such claim. App. 155a.

Having raised it, the Service failed to support it. App. 158a. The immigration judge allowed the Service several adjournments to do so. When the Service produced nothing further, the immigration judge ordered the respondent deported to Ireland. App. 158a-159a. It being already established that Ireland would accept him, the immigration judge did not inquire whether the respondent feared persecution in the United Kingdom.

The Service's claim that deportation to Ireland would be prejudicial to the interests of the United States failed consistently. The immigration judge rejected it once, the BIA twice. App. 134a-147a, 156a-159a. The BIA noted that the INS's position was unprecedented. App. 155a.

The JNS had the BIA decision certified to Attorney General Edwin Meese.

App. 5a-6a. The case rested in his office for an entire year. On June 9, 1988, he disallowed the respondent's designation of country and ordered him deported to the United Kingdom. App. 116a-130a.

<u>The Respondent's Motion to Reopen: The BIA Grants His Motion and Awards Him a Hearing on His Claims for Political Asylum and Withholding of Deportation.</u>

Six months prior to the issuance of the Meese decision, the respondent filed a motion to reopen. It sought remand of the case "for the purpose of a hearing on respondent's claims for asylum ... , withholding of deportation ... , and for redesignation of country of deportation." C.A. App. 364.

The motion was expressly grounded upon the implementation, in Ireland, of the Extradition (European Convention on the Suppression of Terrorism) Act, 1987. App. 6a; C.A. App. 366, 372-373. The Act became effective on December 1, 1987. The

respondent filed his motion on December 3, 1987. C.A. App. 364-456.

Section 3 of the Act had no forebear in Irish law. It specified that certain offenses could not be regarded as political offenses; it rendered the political offense exception inapplicable as a matter of law to offenses for which the British government sought the respondent's extradition. As to those offenses, extradition became mandatory with the Act's implementation. C.A. App. 461.

When the Act became effective on December 1, 1987, the order directing the respondent's deportation to Ireland became the functional equivalent of an order directing his extradition from Ireland to the United Kingdom. Confronted with the emergent certainty of return to the country from which he had consistently sought refuge owing to fears of persecution, the respondent moved immediately to reassert

the applications for political asylum and withholding of deportation lodged in June 1983 and withdrawn in September 1986 in conjunction with his designation of Ireland.

The Board, 3-2, granted the respondent's motion to reopen on November 14, 1988. App. 92a-115a. The decision discussed what the regulations which govern motions to reopen require. The Board applied its expertise in the interpretation of those regulations to the respondent's motion and determined it was appropriately granted.

The Board emphasized that subsequent to the respondent's designation of country, circumstances changed, indeed in a way "unprecedented." App. 99a. The singular facts of the case were again emphasized. The Board recognized that the regulations governing motions to reopen had been promulgated to permit precisely

this type of situation to be addressed: they protect the potential deportee when changed circumstances raise the threat of persecution; they protect the Attorney General's delegatees from having to expend scarce time passing upon asylum claims based on remote or "unripe" fears of persecution. App. 98a-99a.

The Board determined that the respondent's evidence established a prima facie claim of a well-founded fear of persecution. App. 99a; and see C.A. App. 4-13, 407-455, 503-709. His asylum application stated, inter alia, that "[o]nce incarcerated my life would be in danger." It further stated that he had already been the victim of persecution in the United Kingdom, having been tortured and beaten while in the custody of the security forces there. C.A. App. 8, 11.

His motion to reopen detailed that threats have already been made by the

security forces to family members about that which awaits the respondent upon his return. Evidence supporting the motion documented that the security forces have the will and ability to carry the threats out.[2] C.A. App. 503-709.

The respondent's supporting submissions established, inter alia, that family members have been subject to repeated

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[2] The number and frequency of fatal shootings by the security forces of young men believed to be members of or sympathizers of the republican movement caused Amnesty International to conclude that "a wide-ranging judicial inquiry is essential." The respondent had submitted the Amnesty report to the Board. C.A. App. 514-516, 517-518, 543-544. The respondent had also submitted a book by the senior British police official deputed to conduct an official government inquiry into six such "shoot-to-kill" incidents. He stated in his book:

> The circumstances of those shootings pointed to a police inclination, if not a policy, to shoot suspects dead without warning rather than to arrest them. Coming, as these incidents did, so close together, the suspicion of deliberate assassination was not unreasonable. C.A. App. 690.

arrest and interrogation, that a sister's home has been often raided by the security forces, and on one such occasion, the security forces seized the transcript of the respondent's testimony before Judge Sprizzo, that relatives, friends, and neighbors have been victims and targets of sectarian attacks running the gamut from beatings, to attempted murder, to actual murder, that the respondent's family and the other occupants of their tiny nationalist enclave live subject to the intrusive daily presence in their homes and on their streets of the British Army and the paramilitary Royal Ulster Constabulary (RUC), that, in addition to the respondent, a sister was interned by the British government and, as with respondent, imprisoned without charges and without trial, that respondent's family's home was destroyed when bombed by loyalist paramilitaries, and that the respondent's case has been

the subject of provocative media attention in the United Kingdom. C.A. App. 8-11, 13, 407-448.

Finally, certain particulars of the case--with which the Board was familiar, the case having already been before it on four occasions--were made the subject of specific comment. The Board stated:

> The respondent has not been accused of any violations of law in the United States other than his illegal entry. At least one United States court has found that his crimes in the United Kingdom were politically motivated.

The Board concluded that the motion should be granted in an exercise of its discretion. App. 99a-100a.

Attorney General Thornburgh Reverses the BIA Decision in Favor of the Respondent.

The Service had the BIA decision in favor of the respondent certified to the Attorney General. App. 7a. No other case has ever been twice subjected to certification review by the Attorney General.

On June 30, 1989, the Attorney General reversed the BIA decision that had granted the respondent a hearing. App. 46a-91a. The Attorney General turned first to discrediting the argument that Attorney General Meese's order directing deportation to the United Kingdom was "an unforeseen, adverse administrative decision, constituting a 'new fact.'" App. 57a, 62a, 65a-67a.

The respondent had never made any such argument. He had no need of it; his motion to reopen was filed six months before the Meese decision issued. The motion was premised on the change in his circumstances occasioned by the implementation of the Extradition Act--not by the issuance of the Meese order[3]--and it was

[3]The Meese and Thornburgh decisions themselves acknowledge that the filing of the motion to reopen was premised on the December 1, 1987, implementation of the Extradition Act. App. 53a, 57a and n. 19, 129a. The motion had actually been before

filed within 48 hours of the implementation of the Act.

The Attorney General found that the Extradition Act was not "previously unobtainable material evidence" or "reasonable justification permitting respondent to withdraw his waiver of his claim for asylum." He further determined that implementation of the Act was "neither sudden nor unforeseeable" and that it had no material effect on the respondent's position. App. 59a-71a, 74a. The Attorney General eschewed reference to the Extradition Act's Section 3, which refutes his determination that the Act had no material effect on the respondent's position.

Although the BIA had found the respondent's fears of persecution sufficiently compelling to warrant an evidentiary

Attorney General Meese for a considerable period of time prior to the issuance of his decision; he chose to remand the motion to the BIA. App. 129a.

hearing, the Attorney General denied the respondent the ultimate relief sought without affording him the hearing the BIA had ordered. He ruled that the respondent was not entitled to political asylum and was statutorily ineligible for withholding. App. 82a-91a.

The Attorney General did not balance the nature and degree of persecution awaiting the respondent in the United Kingdom against any of the considerations recited to justify the Attorney General's negative exercise of discretion: the Attorney General specifically refused to consider the evidence put forward in support of the respondent's claims of persecution. App. 64a n. 21. Finally, with complete disregard for the district court's decision that the respondent had committed only political crimes, the Attorney General concluded precisely to the contrary, finding that he had committed

serious nonpolitical crimes--and engaged in the persecution of others--and was therefore ineligible for the relief sought. App. 83a-88a.

The Decision at Issue: The Second Circuit Rules That the Attorney General Abused His Discretion in Denying Respondent a Hearing.

Attorney General Thornburgh expressly acknowledged, citing decisions of this Court, that his decision was subject to judicial review for abuse of discretion. App. 55a and n. 8. The Second Circuit reviewed it and, 2-1, "conclude[d] that in the singular circumstances of this case he abused his discretion in denying Doherty's motion to reopen." App. 12a. The court remanded the case to the Board for further proceedings.[4] App. 28a-29a.

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[4]Although the court reversed the Thornburgh decision, it affirmed the Meese decision. It held that under 8 U.S.C. 1253(a), Congress had "left the Attorney General broad discretion to determine what constitutes prejudice to national interests," and that such finding is "'essentially unreviewable[.]'" App. 8a.

Writing for the majority, Judge Pratt stressed that the Attorney General's determinations as to the ultimate availability of the relief sought could not properly be made on the existing record. As to the withholding of deportation claim, Judge Pratt stated that "the need for an evidentiary hearing should be obvious[]" as the respondent's ultimate success or failure necessarily turns on the resolution of "formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record." App. 16a-17a. As to the asylum claim, he noted, similarly, that its correct resolution turned on "facts...more properly determined at a hearing[.]" App. 26a-27a.

The Attorney General had expressly stated that he could decline to reopen even when the movant had established a prima facie case for withholding of deportation. App. 64a n. 21. The court point-

ed out that INS v. Abudu, 485 U.S. 94 (1988), is to the contrary. App. 16a.

The court found that the Attorney General "seriously exceeded his discretion" when he denied the respondent political asylum on the ground that deporting him to the United Kingdom, his fears of persecution notwithstanding, would advance United States foreign policy interests. App. 26a. The court further found that this decision was premised "on the types of geopolitical concerns that congress intended to eliminate from asylum cases" (App. 25a), and thus was not based on "the 'legitimate concerns' of the relevant statutory provision," the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. App. 18a.

The court rejected the "foreseeability" standard on which the Attorney General had relied, finding that it had no foundation in law and "would lead to absurd con-

sequences" if applied. App. 13a-15a. It noted that even under this spurious criterion, the Attorney General's decision was insupportable: the Meese order disallowing deportation to the designated country was hardly "foreseeable," since the Attorney General had never before invoked his discretion to disallow a proper designation. App. 14a.

The court also rejected the Attorney General's determination that the respondent had "waived" his right to seek relief through asylum and withholding in 1987, having "assumed the risk" of all subsequent changes in circumstances when he did not go forward on his claims for asylum and withholding in 1986. App. 79a-80a. The court found such reasoning "incompatible with any motion to reopen." App. 27a. It concluded by stating that "the government's professed concern for the 'integrity of the administrative process' [is] unconvincing in light of its own actions in this case."[5] App. 28a.

REASONS FOR DENYING THE WRIT

Summary of the Argument

Recent developments bear directly on the questions presented in the certiorari petition. These developments militate strongly against the grant of certiorari. Certiorari is also unwarranted given the

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[5]Judge Lumbard concurred in the affirmance of the Meese order and dissented from the reversal of the Thornburgh order. App. 29a-45a. He faulted the majority for "implicitly" concluding that the Board's decision deserved more deference than Attorney General Thornburgh's, having earlier noted that despite seven years "to develop and present his case," the respondent "failed to convince the Attorney General" of its merit. App. 34a, 33a.

Over the course of those seven years, the respondent had, however, on no less than eight separate occasions, convinced district court judges, Second Circuit judges, immigration judges, and BIA members that his legal positions have merit. Given this history, the Second Circuit, as the reviewing court, was entitled to note that the Attorney General's decisions had been at odds with those of his delegatees. Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

interlocutory stage of the proceedings and the highly particularized nature of the case.

The executive's petition attacks allegedly incorrect interpretations of the regulations governing motions to reopen. The Immigration Act of 1990, enacted on November 29, 1990, compels the Attorney General to issue new regulations governing reopening by May 28, 1991. See Appendix 1. The imminence of these new regulations obviates any need for the Court to speak on reopening at the present time and makes it likely that such opinion would be of limited utility. Any further attention by the Court to motions to reopen would be more usefully directed to guiding the evolving administrative practice under the new reopening regulations, rather than under the old ones.

The executive branch also contends that the Second Circuit grossly misinter-

preted the Refugee Act of 1980 by holding that foreign policy considerations are not relevant to the determination of an individual's application for political asylum. After filing the petition, the executive branch signed a settlement agreement in a major lawsuit challenging the manner in which asylum claims are adjudicated.

The stipulation thoroughly undercuts the argument that the Second Circuit's decision is wrong. The stipulation explicitly states that foreign policy considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution. See Appendix 2. The Second Circuit's decision is utterly consonant with the interpretation of the Refugee Act embodied in the stipulation to which the executive branch has bound itself.

Review by certiorari is ill-advised for reasons having to do with the nature

of the case itself. The history of the case is singular, the case itself is peculiarly fact-specific, and the decision at issue is interlocutory in nature.

The Board granted the respondent's motion to reopen, and the Attorney General reversed the Board. The administrative process culminated in nothing more than routine judicial review by the Second Circuit for abuse of discretion. Grant of certiorari at this juncture would be premature and unlikely to result in an opinion of broad applicability.

Recent events, as well as the history of the case, make clear that the executive branch does not come before this Court with serious questions about the Refugee Act and motions to reopen. Rather, as has been the consistent history of this case, the executive seeks to deprive the respondent of the benefit of yet another decision in his favor. That decision simply

says that the respondent is entitled to a hearing at which his claims for political asylum and withholding of deportation can be fairly addressed and resolved.

Given the government's goal of using the immigration proceeding to accomplish the respondent's de facto extradition to the United Kingdom, this Court should not countenance him being deprived of the protection of the ordered hearing, especially since his evidence of persecution has been found compelling enough to warrant one. The respondent's return, without hearing, to the country where he fears persecution cannot do other than send the clear message that for litigants disfavored by the government, there will not be equal justice under law.

1. The enactment of legislation compelling the Attorney General to issue new regulations governing motions to reopen by May 28, 1991, and this Court's prior attention to motions to reopen make review of the Second Circuit's interlocutory decision unnecessary.

The tone of the petition suggests that the Second Circuit has jeopardized the Republic by reversing the Attorney General's denial of the respondent's motion to reopen. The circuit court's decision is a modest one, however, and falls squarely within the ambit of pronouncements by this Court and by other circuits on such motions. Although rendered in a case that is singular, the decision itself is unremarkable and merely remands for a hearing on whether the respondent is entitled to the substantive relief sought.

This Court's voice has been heard regularly on motions to reopen. It has spoken on them even very recently. See INS v. Abudu, 485 U.S. 94 (1988); INS v. Rios-Pineda, 471 U.S. 444 (1985); INS v.

Jong Ha Wang, 450 U.S. 139 (1981) (per curiam).

In INS v. Abudu, 485 U.S. 94, this Court held that a court of appeals must apply the abuse-of-discretion standard when reviewing administrative denials of motions to reopen deportation proceedings to request asylum. Id. at 105, 107. Confronted with an administrative denial of a motion to reopen deportation proceedings to request asylum, the Second Circuit did only what this Court has ruled it should do: it reviewed for abuse of discretion, taking careful note of Abudu. App. 11a, 12a, 13a, 16a, 18a.

The Second Circuit decision does not conflict--in principle or otherwise--with Abudu or with any decision of any other circuit. No conflict can be fabricated out of dictum about the sensitive nature of asylum determinations. Pet. 20-21.

Courts of appeal are authorized to do

precisely what the Second Circuit did. They can, and regularly do, review decisions denying asylum and withholding of deportation. They can, and regularly do, reverse administrative denials both of motions to reopen and of administrative decisions denying applications for asylum and withholding. See, e.g., Perez-Alvarez v. INS, 857 F.2d 23 (1st Cir. 1988); Rodriguez v. INS, 841 F.2d 865 (9th Cir. 1987); Aviles-Torres v. INS, 790 F.2d 1433 (9th Cir. 1986); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985). In reversing the administrative denial of respondent's motion to reopen, the Second Circuit did nothing irregular or unusual.

Even had it, review by certiorari would remain unwarranted, owing to the effect of newly-enacted legislation. The Attorney General's argument is, at core, that the regulations governing motions to reopen did not permit respondent to file

his motion to reopen when he did, a view shared neither by the Second Circuit nor by the Board. Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 136 Cong. Rec. H13,229 (daily ed. Oct. 26, 1990), signed into law on November 29, 1990, compels the Attorney General to issue new regulations prescribing when motions to reopen can be filed, the maximum time period for filing them, and the number of such motions that can be filed. See Appendix 1 to this brief for the text of Section 545(d). The Attorney General must issue the new regulations by May 28, 1991. The imminent promulgation of the new regulations makes review of the instant decision an unworthy use of this Court's scarce judicial time.

2. The intensely fact-specific nature of the case, its convoluted and singular history, and the interlocutory stage of the proceedings make review by certiorari at this juncture unwarranted.

The decision at issue is interlocu-

tory and merely remands the case for a hearing. The court made no ruling on whether the respondent is entitled to the ultimate relief of either political asylum or withholding of deportation. It determined a hearing was necessary to resolve "formidable questions of fact" central to resolution of his entitlement to the relief sought. App. 16a-17a.

The Attorney General, in a profound abuse of discretion, had resolved those questions against the respondent. He did so on the basis of the record in a proceeding to which the respondent was not a party and without affording the respondent any hearing whatsoever.

The Attorney General punctuated his decision with abundant references to two of several McMullen decisions, one by the BIA, one by the Ninth Circuit. App. 84a-89a. As between the McMullen deportation proceeding and the instant case, there is

non-identity of parties and non-identity of issues. Yet the Attorney General relied on the record in that unrelated proceeding to establish that the respondent in the instant case had engaged in persecution of others and had committed serious non-political crimes.

Judge Sprizzo's decision unarguably speaks with more authority on the nature of the respondent Doherty's conduct than do decisions about the nature of the respondent McMullen's conduct. Judge Sprizzo's treatment of the character of the IRA and of the respondent Doherty's activities flatly contradicted the Attorney General's summarily-fashioned conclusion that the respondent was ineligible for the relief sought because he had persecuted others and engaged in serious non-political

crimes.[6]

Judge Sprizzo had had substantial evidence put before him. Witnesses had testified for the government and for the respondent. The respondent's personal history and his involvement in the Irish republican movement, including the Irish Republican Army (IRA), had been thoroughly examined, as had been the IRA as an organization and its activities. The respondent testified at length. Matter of Doherty, 599 F.Supp. at 270; and see C.A. App. 712-943.

The district court measured the respondent's conduct against the traditional criteria. Matter of Doherty, 599 F.Supp.

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[6]For precisely this reason, the Attorney General and the dissenting Judge Lumbard labored to explain why Judge Sprizzo's decision about the nature of the respondent's--Joseph Doherty's--activities was of no significance, while a decision about the nature of someone else's--Peter McMullen's--activities was dispositive. App. 84a, 44a.

at 274. Finding the traditional two-pronged analysis not adequately rigorous, Judge Sprizzo also evaluated the respondent's offenses as against a dozen other, stricter criteria.

The district court considered: (1) whether the nature of the act was violative of any international law or (2) inconsistent with international standards of civilized conduct; (3) the context in which the act was committed; (4) the status of the party who committed the act; (5) the nature of the organization on whose behalf the act was committed, including its structure and its mode of internal discipline; (6) the particularized circumstances of the place where the act took place; (7) whether the act was such as to cause indiscriminate death or injury or damage or (8) was directed against civilians or civilian representatives of the government or (9) was com-

mitted in a place other than the territory where political change was to be effected; (10) whether hostages were killed or injured; (11) whether principles in the Geneva Convention were violated; and (12) whether any act was committed for personal reasons. Id. at 274-277.

Having weighed all of these factors in the context of the voluminous evidence put forward about the respondent's conduct, Judge Sprizzo determined that the respondent had not committed common crimes. Rather he had committed only political offenses.

Even apart from Judge Sprizzo's decision, the Second Circuit was completely correct when it determined that the Attorney General seriously exceeded his discretion when he denied relief without permitting respondent the hearing ordered on his application for withholding of deportation. INS v. Abudu, 485 U.S. 94, speaks

directly to this point:

> [I]n cases in which the ultimate relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead ... and simply determine that ... the movant would not be entitled to the discretionary grant of relief. (emphasis added).

Id. at 105.

Further, the respondent had demonstrated prima facie entitlement to the relief sought. Nonetheless, the Attorney General denied him opportunity to present at hearing additional evidence in support of his applications for political asylum and withholding of deportation. The Attorney General did not even permit the respondent an evidentiary hearing at which he might establish the inapplicability of the grounds on which the Attorney General found him ineligible, i.e., that he had persecuted others and committed serious non-political crimes. The Second Circuit decision awarding the respondent a hearing

on his applications for asylum and withholding was consistent with the letter and spirit of existing authorities; the Attorney General's decision denying him any hearing whatsoever was not. See, e.g., Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) at 20 para. 86, 36 para. 152, 37 paras. 156-157, 41 para. 176, 42 para. 180, 48 paras. 201-202; Castro-O'Ryan v. INS, 847 F.2d 1309, 1314 (9th Cir. 1988); Arauz v. Rivkind, 845 F. 2d 271, 276-277 (11th Cir. 1988); Shahandeh-Pey v. INS, 831 F.2d 1384, 1387-1389 (7th Cir. 1987); Matter of Gonzalez, Int. Dec. #3071 at 4, 5, 7 (BIA 1988); Matter of Pula, Int. Dec. #3033 at 9 (BIA 1987); 55 Fed. Reg. 30,683, 30,684 (to be codified, respectively, at 8 C.F.R. 208.13(c) and 208.14 and at 8 C.F.R. 208.16(c)).

Notwithstanding the thorough correct-

ness of the Second Circuit decision, other reasons make the instant case a vehicle ill-suited for certiorari review. Its essential inaptness for this purpose flows from the singular and convoluted nature of the litigation. Decisionmakers have frequently commented on its unique aspects. Even Judge Lumbard, whose dissent is the basis of the government's certiorari petition, acknowledged the "extraordinary" character of the case and its "unusual posture." App. 34a, 35a. A decision by this Court on any of the questions presented will thus be of little precedential value. The particularized facts of the instant case make the fashioning of an opinion capable of being of guidance to other litigants unlikely.

Finally, given the history of this case, the Court can be sure that when respondent's entitlement to the substantive relief sought is finally resolved,

this Court again will be confronted with a petition for certiorari. The Court can then address any issue(s) worthy of its attention on the basis of a fully-developed evidentiary record.

3. The petition should be rejected because the executive branch has acknowledged that foreign policy concerns and other political and ideological factors are not relevant to the determination of whether an applicant is eligible for asylum.

The government claims that the Second Circuit's decision is based on a profound misinterpretation of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The gravamen of its argument--that the Attorney General can grant or deny asylum, even to individuals found to have a well-founded fear of persecution, on the basis of foreign policy considerations--is squarely at odds with all analyses of the Act. Through it, the executive branch strives to have this Court read into the Refugee Act of 1980 the political and

geographic considerations Congress enacted that legislation to eliminate.

The Second Circuit engaged in a careful examination of the Act's legislative history, put before the court in an amicus brief filed by members of Congress. See Doherty v. U.S. Department of Justice, 908 F.2d 1108, 1110 (2d Cir. 1990). The Second Circuit concluded that in passing the Refugee Act of 1980,

> congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum. To use Judge Learned Hand's terminology, these were "considerations that Congress could not have intended to make relevant" to asylum. [United States ex rel. Kaloudis v.] Shaughnessey, 180 F.2d at 491.

App. 21a; see also App. 17a-27a.

The executive branch petition argues that under the Refugee Act of 1980, the Attorney General is free to consider foreign policy concerns when passing on asylum applications. The Attorney General's

decision in the instant case gives ominous voice to that which is implicit in the executive's argument: the Attorney General may, when he finds it expedient, actually deny protection, on the basis of foreign policy considerations, to individuals in real danger of persecution.

In rejecting this perverse interpretation of an avowedly humanitarian law,[7] the Second Circuit, according to the executive branch, imposed "unprecedented" limitations (Pet. 14, 19) on the asylum process. In short, it erred, "gravely" and "fundamentally," when it found that the Attorney General abused his discretion in denying respondent's political asylum application because doing so advanced this country's foreign policy interests. App. 82a. To the contrary, the court's decision was utterly correct, and the govern-

[7] 126 Cong. Rec. 4501 (daily ed. Mar. 4, 1980) remarks of Rep. Rodino).

ment's own, very recent conduct underscores this fact.

After filing this petition, the executive branch signed a stipulated settlement agreement in a major lawsuit, American Baptist Churches v. Thornburgh, Civ. No. C-85-3255 RFP (N.D. Cal.). The American Baptist Churches suit, a class action, raised "systemic challenges to the processing of asylum claims."

The stipulated settlement agreement states that "under the new asylum regulations as well as the old" "foreign policy ... considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." (emphasis added.) The executive branch also stipulated that other irrelevant factors were whether the individual is from a country whose government the United States supports or with which it has favorable relations and whether the

United States agrees with the political or ideological beliefs of the asylum seeker. It also stipulated that the standard for determining whether an applicant has a well-founded fear of persecution applies uniformly to all applicants, regardless of nationality. See American Baptist Churches v. Thornburgh, Civ. No. C-85-3255 RFP, Stipulated Settlement Agreement (N.D. Cal.), dated Dec. 14, 1990, Appendix 2 hereto.

The stipulation, entered into by the Attorney General shortly after the certiorari petition was filed, illuminates the weakness of the "foreign policy concerns" argument advanced by the executive branch in its initial question presented. The language of the stipulation which the executive branch only very recently signed is an admission that the Second Circuit interpreted the Refugee Act correctly when it held that foreign policy and other geo-

political considerations are not relevant to the determination of asylum applications.

The circuit court's decision is embodiment of the very interpretation of the asylum regulations the executive branch bound itself to respect by virtue of the American Baptist Churches stipulation. It matters not that the stipulation speaks in terms of determining whether an individual has a well-founded fear of persecution, as opposed to whether he or she is entitled to asylum: it would be bizarre for the executive to argue that it can deny a refugee the ultimate relief of asylum on the basis of foreign policy considerations it cannot permissibly consider when making the threshold determination of whether the individual is a refugee and therefore in need of protection.

When evaluated in the context of the American Baptist Churches stipulation, the

petition is more clearly understood as the Attorney General's most recent effort to deprive the respondent of the benefit of yet another decision in his favor. It is, given the modest nature of the decision under attack, a particularly cynical effort.

On the basis of a record found to be incomplete and premature judgments as to the merits of the respondent's applications for relief (App. 16a-17a, 26a-27a), the Attorney General would have the respondent deported to a country where he is likely to be persecuted. The Second Circuit has said he is entitled to a hearing at which his claims for political asylum and withholding of deportation can be fairly resolved on the basis of examination of a fully developed record and exclusive of improper foreign policy and geopolitical considerations. Ibid. Given the government's zealous effort to use

this country's immigration laws to accomplish de facto the extradition denied the British government under this country's extradition laws, this case should come before this Court, if at all, only after hearing and only on the basis of the fully developed evidentiary record recognized by the Second Circuit to be essential to fair resolution of respondent's claims.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1991

APPENDIX

APPENDIX

APPENDIX 1

STATUTORY PROVISIONS INVOLVED

Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), 136 Cong. Rec. H13, 229 (daily ed. Oct. 26, 1990):

Sec. 545. DEPORTATION PROCEDURES: REQUIRED NOTICE OF DEPORTATION HEARING; LIMITATION ON DISCRETIONARY RELIEF.

* * *

(d) REGULATIONS ON MOTIONS TO REOPEN AND TO RECONSIDER AND ON ADMINISTRATIVE APPEALS. - Within 6 months after the date of the enactment of this Act, the Attorney General shall issue regulations with respect to -

(1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing

of such motions; and

(2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BAPTIST CHURCHES, et al., Plaintiffs, v. RICHARD L. THORNBURGH, GENE MCNARY, and JAMES A. BAKER, III, Defendants.	) Civ. No. C-85-3255 RFP) STIPULATED SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs, many Salvadoran and Guatemalan citizens in the United States, have filed this action against Defendants, Richard L. Thornburgh, on behalf of the United States Department of Justice, Gene McNary, on behalf of the Immigration and Naturalization Service ("INS"), and James A. Baker, III, on behalf of the United States Department of State, raising, among other issues, systemic challenges to the processing of asylum claims filed by Salvadorans and

Guatemalans pursuant to the Refugee Act of 1980 and the regulations promulgated thereunder; and

WHEREAS, the system of asylum processing has been significantly changed by regulations effective October 1, 1990; and

WHEREAS, under the new asylum regulations as well as the old:

foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

whether or not the United States Government agrees with the political or

ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities; and

WHEREAS, Section 302 of the Immigration Act of 1990, Pub. L. No. 101-649, to be codified at Section 244A of the Immigration and Nationality Act, amends the Immigration and Nationality Act to authorize the Attorney General to designate any foreign state (or any part thereof) so as to give Temporary Protected Status to nationals of such state; and

WHEREAS, Section 303 of the Immigration Act of 1990 designates El Salvador under INA Section 244A and thereby enti-

tles Salvadorans who meet the requirements of Section 303 to Temporary Protected Status; and

WHEREAS, Plaintiffs and Defendants believe that it is in their best interests to settle this action by establishing the practices and procedures set forth below;

THEREFORE, Plaintiffs and Defendants enter into and stipulate that this agreement imposes binding obligations on the parties and their successors and that this agreement constitutes and full and complete resolution of the issues raised in this action.

* * *

[Body of stipulation omitted]

Dated: December 14, 1990

Signed:
For Plaintiffs:

/s/
Marc Van Der Hout
National Lawyers Guild

/s/
Lucas Guttentag
American Civil Liberties Union

/s/
James J. Garrett
Michael L. Zigler
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Attorneys for Plaintiffs

For Defendants:

/s/
Immigration and Naturalization Service

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Executive Office for Immigration Review

/s/
United States Department of State

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Supreme Court, U.S.
FILED
FEB 6 1991
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 90-925

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENNETH W. STARR
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REPLY BRIEF FOR THE PETITIONER

Respondent makes virtually no effort to rebut our submission that the court of appeals seriously erred in holding that the Attorney General abused his discretion when he decided that the special humanitarian relief of asylum should be withheld from respondent, an active member of a terrorist organization and convicted murderer. That holding undermines the credibility of the United States' efforts to combat terrorism and promote respect for the rule of law. In addition, the court of appeals' insistence that asylum determinations be wholly divorced from the foreign-policy context in which they arise threatens to interfere both with the fair and sensible administration of the asylum program and the President's ability to fashion refugee policies consistent with the national interest.

The court of appeals compounded its error by refusing to respect the Attorney General's discretionary determi-

nation that respondent had not shown a justification for reopening the deportation proceedings to allow him to file an *untimely* application for asylum and withholding of deportation, especially since respondent previously had waived his right to seek that relief. Such interference with the Attorney General's discretion in administering the immigration laws fails to respect this Court's decisions emphasizing the narrow scope of judicial review in the reopening context. Respondent's efforts to justify that interference are unavailing.

Contrary to respondent's contention (Br. in Opp. 23-25, 26, 31, 43-46), there are no "recent developments" that detract from our submission that the asylum and reopening issues warrant review by this Court. The new statutory provision and recent settlement decree on which respondent relies do not address the issues in this case. See pages 4-5 and 9-10, *infra*.

A. 1. The court of appeals held that the Attorney General has only a "limited role" and "limited discretion" in deciding whether to grant or deny asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158. Pet. App. 25a. In particular, the court held that the Attorney General may not consider "factors such as the government's geopolitical and foreign policy interests"—including "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Id.* at 21a, 26a. We explain in the certiorari petition (at 14-15) that these limitations cannot be reconciled with the text of Section 208(a). That provision confers unfettered discretion on the Attorney General to determine whether an alien who satisfies the threshold requirement of being a "refugee" should be granted asylum. See 8 U.S.C. 1158(a) (an alien "may be granted asylum *in the discretion of the Attorney General* if the Attorney General determines that he is a refugee within the meaning of section 1101(a)(42)(A)") (emphasis added). Compare *Jay* v. *Boyd*, 351 U.S. 345, 351-352 (1956). Remarkably, respondent fails even to mention the text of

Section 208(a), the very provision under which he seeks relief.

2. Respondent's only substantive point on the asylum issue is a passing endorsement (Br. in Opp. 41) of the Second Circuit's reliance on the legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. See Pet. App. 20a-24a. But as we previously explained (Pet. 17-19), the court of appeals completely misread the legislative history. What Congress did in the Refugee Act was to remove the geographical and ideological limitations on *eligibility* for the special relief that could be granted to aliens outside the United States under 8 U.S.C. 1153(a)(7)(A)(i) (1976), a provision applied only to aliens from Communist countries or the Middle East. Congress replaced that provision with a new Section 207, 8 U.S.C. 1157, which permits the Attorney General, in his "discretion," to admit "refugees" (now defined in geographically and ideologically neutral terms in 8 U.S.C. 1101(a)(42)(A)) from outside the United States, subject to flexible numerical limitations. The court of appeals' notion that Congress barred the Attorney General from considering foreign-policy factors in exercising that discretion is refuted by 8 U.S.C. 1157(e)(6), which identifies "the foreign policy interests of the United States" as a relevant factor.

Section 208 of the Act, at issue here, grants the Attorney General corresponding authority to grant special relief (asylum) to refugees who are already in the United States. There is nothing in the text or legislative history of Section 208 even remotely suggesting that the Attorney General is barred from considering in the asylum context the very foreign-policy interests that Congress required to be taken into account in admitting refugees under Section 207. As with our discussion of the text of Section 208, respondent does not attempt to refute our explanation of the errors in the court of appeals' analysis of the legislative history.

3. Respondent contends (Br. in Opp. 42-46) that the Attorney General's reliance on foreign policy considera-

tions is inconsistent with the recent settlement agreement in *American Baptist Churches* v. *Thornburgh*, Civ. No. C-85-3255 RFP (N.D. Cal.), a class action brought on behalf of Salvadoran and Guatemalan aliens. Not so. The settlement provides that "foreign policy" and "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations" are "not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." Br. in Opp. App. 51. The quoted passages provide only that foreign policy considerations are not relevant in determining whether an alien has a well-founded fear of persecution, and thus qualifies as a "refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A). However, "refugee" status establishes only that an alien is *eligible* for asylum. As we have explained, whether an alien who meets that threshold requirement will actually be granted asylum is expressly committed to the discretion of the Attorney General under Section 208(a). That provision says nothing to prohibit the Attorney General from taking into account foreign-policy considerations, including our Nation's opposition to terrorism. Hence, there is no inconsistency whatever between the Attorney General's reliance on such factors in this case and the settlement agreement in *American Baptist Churches*.

4. As we have pointed out (Pet. 15-16), the court of appeals' conclusion that the Attorney General has only a "limited role" and "limited discretion" under Section 208(a) cannot be squared with this Court's expansive view of the Attorney General's discretion in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 nn. 5 & 6, 441 (1987). Once again, respondent is silent; he makes no effort to reconcile the court of appeals' crabbed view of the Attorney General's discretion with *Cardoza-Fonseca*. Indeed, respondent does not even mention that decision. Nor does respondent dispute our submission (Pet. 21) that the Second Circuit's holding in this respect is inconsistent with decisions of other courts that have made

clear that foreign policy concerns are intimately associated with asylum decisions. See *Alvarez-Flores* v. *INS*, 909 F.2d 1, 4 n.1 (1st Cir. 1990); *M.A. A26851062* v. *INS*, 899 F.2d 304, 313-314 (4th Cir. 1990) (en banc); *Kashani* v. *Nelson*, 793 F.2d 818, 827-828 (7th Cir.), cert. denied, 479 U.S. 1006 (1986); accord *INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (quoted at Pet. 20). In light of this divergence from other appellate rulings, the clear error below, and the substantial importance of the question, review of the court of appeals' asylum ruling is warranted.

B. 1. Respondent tries to obscure the unprecedented limitations the court of appeals has placed on the Attorney General's discretion in asylum cases by focusing (Br. in Opp. 28-40) on the procedural aspects of the court of appeals' holding. In respondent's view, the Attorney General could not deny him asylum or withholding of deportation without a hearing—even though respondent previously had made a tactical decision to forgo such relief. Respondent is wrong. This Court has repeatedly held that whether to grant a motion to reopen deportation proceedings is committed to the Attorney General's discretion, *INS* v. *Abudu*, 485 U.S. at 105-106; *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981); thus a court may order reopening "only in the most extraordinary circumstances." *Abudu*, 485 U.S. at 107 n.11. As *Abudu* confirms, the Attorney General may deny a motion to reopen even where the alien seeks to apply for asylum or withholding of deportation. To be sure, in such a case, there would be no hearing on the question of asylum or withholding of deportation. But that is the consequence of the alien's default in failing to apply for special relief at the proper time, when a hearing might have been held. Thus, contrary to respondent's assertion (Br. in Opp. 38), the Attorney General's denial of the motion to reopen in this case was fully consistent with both "the letter and spirit of existing authorities" concerning an

opportunity for a hearing on requests for asylum and withholding of deportation.[1]

2. The Attorney General was especially justified in denying the motion to reopen in this case without a hearing, because there is no dispute about the conduct of respondent on which the Attorney General relied in concluding that he should be denied asylum as a discretionary matter and would be ineligible for withholding of deportation under the exceptions in 8 U.S.C. 1253(h)(2)(A) and (C). See Pet. 7, 26-29. Respondent does not deny that he is a member of the Provisional Irish Republican Army (PIRA) or that he had an active leadership role in the PIRA in Northern Ireland, serving as an officer, gathering ammunition, distributing arms, and training and drilling other PIRA members. Pet. App. 89a-91a. Nor does respondent deny that he was convicted for a firearms violation; for smuggling explosives in a hijacked car; and for murder, attempted murder, and possession of firearms and ammunition in the 1980 epi-

[1] None of the "existing authorities" on which respondent relies (Br. in Opp. 38) concerns an application for asylum or withholding of deportation submitted with a motion to reopen. Indeed, the cited paragraphs of the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), prepared by the United Nations High Commissioner for Refugees, discuss the criteria to be applied in determining *refugee status*. The *Handbook* specifically "does not deal with * * * the granting of asylum to refugees or the legal treatment of refugees after they have been recognized as such." *Id.* at 7 para. 24. In this case, the Attorney General assumed, *arguendo*, that respondent satisfied the threshold eligibility requirement of being a refugee, Pet. App. 12a, 82a-83a, and it addressed only the latter questions. The *Handbook* therefore has no relevance here. The recently revised INS regulations that respondent cites prescribe standards for considering an asylum or withholding-of-deportation claim in the normal course, not, as here, a belated effort to raise such a claim in a motion to reopen. See 8 C.F.R. 208.13(c), 208.14 and 208.16(c), as revised by 55 Fed. Reg. 30,683-30,684 (1990). Finally, in the judicial and BIA decisions on which respondent relies (Br. in Opp. 38), the asylum application was timely filed, but the immigration judge or BIA either failed to exercise any discretion or failed to consider certain relevant factors.

sode in Belfast—which involved hijacking a van, seizing a private residence, holding civilians hostage, ambushing a car full of British soldiers, and killing a British officer. *Id.* at 2a, 46a-47a, 84a-88a. In fact, respondent admitted all of these things in his testimony in the extradition hearing. *Id.* at 43a-44a, 46a-48a, 87a & n.47, 88a-91a.

3. In arguing that the Attorney General erred in finding him ineligible for withholding of deportation because there were "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside of the United States" and "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion" (8 U.S.C. 1253(h)(2)(C) and (A); see Pet. App. 89a-91a), respondent relies (Br. in Opp. 33-36) on Judge Sprizzo's refusal to authorize his extradition to the United Kingdom. Judge Sprizzo believed, erroneously in our view, that respondent's crimes in Belfast fell within the then-existing exception in the extradition treaty for "political" offenses. *In re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); see Pet. 3 n.3.

The court of appeals did not suggest that the denial of extradition obligated the Attorney General to find that respondent fell outside the statutory exclusions from eligibility for withholding of deportation. See Pet. App. 15a-17a. And with good reason. As the Attorney General explained, respondent's eligibility for withholding of deportation involves questions of statutory interpretation under the Immigration and Nationality Act that are distinct from the question of treaty interpretation in an extradition case. *Id.* at 84a n.44. Moreover, as Judge Lumbard noted (*id.* at 44a n.8), the denial of an application for an extradition warrant is not appealable and has no res judicata effect. For these reasons, the Ninth Circuit has specifically held that an alien may be found ineligible for withholding of deportation under 8 U.S.C. 1253(h)(2)(C), even though his offense had previously been determined in an extradition proceeding to fall

within a treaty exception for political offenses. *McMullen* v. *INS*, 788 F.2d 591, 596-597 (9th Cir. 1986).

4. In denying respondent's motion to reopen, the Attorney General relied not only on the ground that respondent would not ultimately be granted the discretionary relief of asylum or be found eligible for withholding of deportation (Pet. App. 81a-91a); he also relied on the independent ground that respondent had not identified new evidence or changed circumstances that warranted reopening to allow respondent to apply for the relief he previously had waived. *Id.* at 62a-78a. The court of appeals nevertheless found reopening justified by two events: Attorney General Meese's decision rejecting respondent's designation of Ireland as the country of deportation, and the 1987 Irish Extradition Act. *Id.* at 12a-15a. Respondent now disavows any reliance on Attorney General Meese's decision (Br. in Opp. 9-10, 16-17) and relies only on the Irish Extradition Act, which implemented a European extradition convention that essentially deleted the "political offense" exception.

As we have explained (Pet. 24-25), Attorney General Thornburgh concluded, after thorough analysis, that the Irish Extradition Act did not constitute "new evidence" or changed circumstances warranting reopening. Pet. App. 59a, 67a-74a. He reasoned: (1) that as respondent himself had previously argued, there was a substantial likelihood under Irish law that he would have been extradited to the United Kingdom even before the Extradition Act was passed; (2) that Ireland had signed the European convention six months *before* respondent withdrew his original application for asylum and withholding of deportation; and (3) that any change in Irish law was irrelevant because respondent will not be deported to Ireland, because the deportation proceedings arise under United States (not Irish) law, and because respondent's asylum and withholding-of-deportation claims turn on conditions in the United Kingdom (not Ireland). Respondent makes no meaningful effort to rebut this reasoning. He merely asserts in passing that "[t]he Attorney General eschewed reference to the Extradition Act's Section 3 [the provision that eliminated the political offense exception], which refutes the determination that the Act had no material effect on the respondent's position." Br. in Opp. 17. This argument is frivolous. The entire point of the Attorney General's discussion of the Extradition Act was that the Act's formal elimination of the political offense exception did not work a material change in Irish law.

Respondent also argues (Br. in Opp. 12-15, 27, 37) that reopening was waranted by the allegedly "new" evidence of conditions in Northern Ireland that he submitted with his motion to reopen. Respondent fails to point out that the Attorney General exhaustively reviewed that submission (Pet. App. 74a-78a) and found that it did *not* warrant reopening, because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence that was presented." *Id.* at 75a; see Pet. 26 n.17. The court of appeals did not find that the Attorney General abused his discretion in this regard (see *Abudu*, 485 U.S. at 106-110); the court found it unnecessary to reach that question because it held that Attorney General Meese's decision and the Irish Extradition Act required reopening. Pet. App. 15a. Respondent's assertion (Br. in Opp. 27) that "his evidence of persecution has been found compelling enough to warrant [a hearing]" therefore is flatly incorrect.

5. Respondent argues (Br. in Opp. 24, 30-31) that review of the reopening issue is not warranted in light of Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (reproduced at Br. in Opp. App. 48-49), which requires the Attorney General, by May 19, 1991, to issue regulations governing the time for filing motions for reopening and reconsideration and the number of such motions that may be filed. This argument is meritless. Section 545(d) of the 1990 Act addresses essentially procedural matters involving filing times and abuse of process through repetitive motions.

It does not resolve the distinct question, presented here, of the standards to be applied in passing on such motions. Thus, the court of appeals' ruling on the reopening issue, like its ruling on the asylum issue, warrants review by this Court.

6. Contrary to respondent's contention (Br. in Opp. 23-24, 26-27, 28, 31-32, 39-40, 47), the fact that the court of appeals remanded to INS for a hearing on the merits of respondent's asylum and withholding-of-deportation claims does not render the case 'interlocutory" in a sense that counsels against certiorari. The court of appeals required a hearing only as a consequence of its holding that the Attorney General abused his discretion in denying respondent's motion to reopen to allow him to apply for asylum and withholding of deportation. That holding is the very subject of our certiorari petition, and our challenge to it would be largely mooted if the hearing were held. Moreover, the court of appeals has definitively held that the Attorney General may not rely on foreign policy considerations (including the Nation's opposition to terrorism) in deciding whether to grant asylum to an alien. That erroneous ruling should not be permitted to stand, and to generate adverse consequences, while awaiting a hearing on remand that will shed no further light on the issue. This case should be brought to a close now.

For the foregoing reasons and those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

FEBRUARY 1991

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Supreme Court, U.S.
FILED
MAY 1 1991
OFFICE OF THE CLERK

No. 90-925

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: DECEMBER 11, 1990
CERTIORARI GRANTED: FEBRUARY 19, 1991

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 88-4084 and 89-4092

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
6-14-88	Case docketed: Petition for review of an agency order filed.
1-3-89	Stipulation Re: withdrawal of appeal received.
1-10-89	Order withdrawing appeal from active consideration by the Court, such withdrawal to be without prejudice to a reinstatement of the appeal by any party so notifying the clerk in writing by 20 days after Atty General decides certification issue* If not thus reinstated, the appeal shall be deemed withdrawn with prejudice. Withdrawal of the appeal from active consideration shall not operate as a dismissal of under FRAP 42(b), and the automatic stay shall remain in effect. * Any appeal filed herein from the attorney General's decision will be consolidated with this appeal after reinstatement. FILED

* * * * *

DATE	FILINGS—PROCEEDINGS
7/11/89	Appellant JOSEPH PATRICK DOHERTY Notice of Re-Instatement Pursuant to the Order of January 10, 1989, *FILED.* (88-4084).
	* * * * *
7/20/89	Case Docketed Petition for Review of a Decision Issued by the U.S. Attorney General on Behalf of the Petitioner JOSEPH PATRICK DOHERTY, *FILED.* (89-4092).
	* * * * *
8-14-89	Record on appeal filed. (original papers of the INS COURT)
	* * * * *
8-25-89	Order granting Appellant JOSEPH DOHERTY'S motion for an extension of time to file principal brief in cases consolidated on appeal; up to and not exceeding October 27, 1989, FILED. (leave to file appellant brief of 100 pages)
09-01-89	Scheduling order #10 FILED (Petitioner's Brief and joint appendix shall be filed on or before October 27, 1989; the respondent's brief shall be filed on or before November 22, 1989 and the argument of the appeal shall be heard as early as the week of December 11, 1989)
	* * * * *
10-27-89	Petitioner JOSEPH DOHERTY—brief filed. (100 pages)
	* * * * *
11-2-89	Amicus Curiae AMERICAN IMMIGRATIONS LAWYERS ASSOC.—amicus curiae brief filed.
	* * * * *
11-6-89	Amicus Curiae MEMBERS OF CONGRESS—amicus brief filed.

DATE	FILINGS—PROCEEDINGS
11-17-89	Order granting Respondent U.S. DEPT OF JUSTICE's motion for extension of time to file respondent's brief in cases consolidated on appeal; respondents brief be filed on or before Dec. 22, 1989, filed.
	* * * * *
12/13/89	Order GRANTED Petitioner DOHERTY motion for extension of time to file reply brief until Jan. 12, 1990 FILED.
12/22/89	Respondent US DEPT. OF JUSTICE brief filed
	* * * * *
12/28/89	Order granted respondent US DEPT OF JUSTICE motion for leave to supplement the record filed.
1-12-90	Petitioner DOHERTY reply brief filed
	* * * * *
1-18-90	Order that in the event that petitioner files a petition for certiorari within the time fram[e] d[e]-cribed in ¶ 1, re[s]pondent shall stay execution of the order of deportation pending a final disposition by the Supreme Court of that petition filed
1-19-90	Case heard before LUMBARD, FEINBERG, PRATT, C.JJ.
	* * * * *
6/29/90	GRANTED IN PART DENIED IN PART, AND REMANDED BY PUBLISHED SIGNED OPINION PER JUDGE PRATT
6/29/90	CONCUR AND DISSENT IN BY PUBLISHED SIGNED OPINION PER JUDGE LUMBARD
6/29/90	JUDGMENT FILED
	* * * * *
8-8-90	Order granting Respondent US DEPT OF JUSTICE motion for additional time to file petition for rehearing with suggestion of rehearing en banc. Filed.

DATE	FILINGS—PROCEEDINGS
8-8-90	Respondent US DEPT OF JUSTICE petition for rehearing with suggestion rehearing en banc Filed
9-13-90	Order DENYING Respondent US DEPT. OF JUSTICE petition for rehearing with suggestion of rehearing en banc Filed
	* * * * *
10-17-90	Mandate (opinion judgment) issued to INS
12-17-90	NOTICE OF FILING petition for writ of certiorari by INS petitioner, dated DEC. 11, 1990, Supreme Ct. #90-925 Filed
2-22-91	CERTIFIED COPY OF ORDER granting petition for writ of certiorari by INS petitioner, dated Feb. 19, 1991, Supreme Ct. #90-925. Filed

EDITOR'S NOTE

PAGES 5 thru 11 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORDER TO SHOW CAUSE, NOTICE OF HEARING AND WARRANT FOR ARREST OF ALIEN

(issued June 18, 1983, to commence deportation proceedings)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that, pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative process, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☒ Released under bond in the amount of $ No bond.

You may request that an Immigration Judge redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

Refugio M Sur — June 17, 1983
(signature of respondent) (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

Refugio M Sur — June 17, 1983
(signature of respondent) (date)

CERTIFICATE OF SERVICE

Served by me at 26 Federal Plaza NYC on June 17 1983 at 10 AM m.

[illegible] Deportation Officer
(signature and title of employee or officer)

REQUEST FOR ASYLUM IN THE UNITED STATES

(filed by respondent in deportation proceedings
on June 27, 1983)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service — No. ———

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A26 185 231

In the Matter of DOHERTY, Joseph Patrick Thomas Respondent.
AKA REILLY, Joseph

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Northern Ireland and a citizen of United Kingdom & Colonies;
3. You entered the United States at an unknown port on or about an unknown date.
(date)

4. You have failed to establish the date, place, and manner of entry into the United States.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you are in the United States in violation of this Act or in violation of any other law of the United States, and Section 291 of the Act in that you have failed to show the time, place and manner of your entry into the United States.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at ———

on ——— at ——— m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: June 17, 1983

(signature and title of issuing officer)

ASSISTANT DISTRICT DIRECTOR
FOR INVESTIGATIONS, N.Y., N.Y.
(City and State)

APPEAR WITH PASSPORT AND IMMIGRATION DOCUMENTS

Form I-221 (Rev. 8-1-77) Y (over)

(Family name)	(First name)	(Middle name)	☒ MALE ☐ FEMALE	BIRTHDATE (Mo.-Day-Yr.)	NATIONALITY	FILE NUMBER
DOHERTY,	JOSEPH	PATRICK		1/20/55	Irish	A26-185-231

ALL OTHER NAMES USED (Including names by previous marriages)	CITY AND COUNTRY OF BIRTH	SOCIAL SECURITY NO. (If any)
JOSEPH REILLY	Belfast Ireland	

	FAMILY NAME	FIRST NAME	DATE, CITY AND COUNTRY OF BIRTH (If known)	CITY AND COUNTRY OF RESIDENCE
FATHER	DOHERTY,	JOSEPH	Belfast Ireland	Belfast Ireland
MOTHER (Maiden name)	DARRAGH,	MAUREEN	" "	" "

HUSBAND (If none, so state) OR WIFE	FAMILY NAME (For wife, give maiden name)	FIRST NAME	BIRTHDATE	CITY & COUNTRY OF BIRTH	DATE OF MARRIAGE	PLACE OF MARRIAGE
NONE						

FORMER HUSBANDS OR WIVES (If none, so state)

FAMILY NAME (For wife, give maiden name)	FIRST NAME	BIRTHDATE	DATE & PLACE OF MARRIAGE	DATE AND PLACE OF TERMINATION OF MARRIAGE
NONE				

APPLICANT'S RESIDENCE LAST FIVE YEARS. LIST PRESENT ADDRESS FIRST.

STREET AND NUMBER	CITY	PROVINCE OR STATE	COUNTRY	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
30 Davis Avenue	Kearney	New Jersey	USA	May	83	PRESENT TIME	
7214 13th Ave., B'klyn	New York	New York	USA	Feb.	82	May	83

APPLICANT'S LAST ADDRESS OUTSIDE THE UNITED STATES OF MORE THAN ONE YEAR

STREET AND NUMBER	CITY	PROVINCE OR STATE	COUNTRY	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
155 Seamount Street	Belfast	Co. Antrim	Ireland	Dec.	79	June	81

APPLICANT'S EMPLOYMENT LAST FIVE YEARS. (IF NONE, SO STATE) LIST PRESENT EMPLOYMENT FIRST

FULL NAME AND ADDRESS OF EMPLOYER	OCCUPATION (SPECIFY)	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
Via Mason Tenders Local #59-HRH	Mason Tender	Feb.	82	PRESENT TIME	
Construction Co., 270 Park Avenue, NYC					
MOFFET CONSTRUCTION CO., New Jersey					
Clancy's Bar, 55th St. & 3rd Ave., NYC - (weekends)	Bartender	March	83	Present	

Show below last occupation abroad if not shown above. (Include all information requested above.)

Plumbers Apprentice		'69	'72

THIS FORM IS SUBMITTED IN CONNECTION WITH APPLICATION FOR:
☐ NATURALIZATION ☐ STATUS AS PERMANENT RESIDENT
☒ OTHER (SPECIFY) Asylum

Are all copies legible? ☐ Yes

SIGNATURE OF APPLICANT: Joe. P Doherty DATE: 6.27.83

IF YOUR NAME IN NATIVE ALPHABET IS IN OTHER THAN ROMAN LETTERS, WRITE YOUR NAME IN YOUR NATIVE ALPHABET IN THIS SPACE.

PENALTY: SEVERE PENALTIES ARE PROVIDED BY LAW FOR KNOWINGLY AND WILLFULLY FALSIFYING OR CONCEALING A MATERIAL FACT.

APPLICANT: BE SURE TO PUT YOUR NAME AND ALIEN REGISTRATION NUMBER IN THE BOX OUTLINED BY HEAVY BORDER BELOW.

COMPLETE THIS BOX (Family name)	(Given name)	(Middle name)	(Alien registration number)
DOHERTY	JOSEPH	PATRICK	NONE

Department of Justice
Immigration and Naturalization Service

Form Approved
OMB No. 1115-00

REQUEST FOR ASYLUM IN THE UNITED STATES

INS Office

Date

1. Family Name	First	Middle Name	2. A number (if any or known)
DOHERTY	JOSEPH	PATRICK	A-26 185 231

All other names used (also include maiden name if married)

Reilly, Joseph

3. Sex: ☒ Male ☐ Female

4. Marital status: ☒ Single ☐ Married ☐ Divorced ☐ Widowed

5. I was born: (Month) (Day) (Year) in (Town or City) (State or Province) (Country)

January 20, 1955 Belfast County Antrim Ireland

6. Nationality — at birth	At present	Other nationalities
Irish	Irish	None

7. If stateless, how did you become stateless?

N/A

Ethnic group	8. Religion	9. Languages spoken
	Roman Catholic	Gaelic and English

10. Address in United States (In care of, if appropriate)
Number and street (Apt. No.) City or town State Zip Code

30 Davis Avenue Kearney, New Jersey

Telephone number (include area code)
(201)997-9237

Address abroad prior to coming to the United States
Number and street (City) (Province) (Country)

155 Spamount Street Belfast County Antrim Ireland

11. My last arrival in the U.S. occurred on: (Mo/Day/Yr)

February 2, 1982

At the port of (City, State)

New York, New York

I X was was not inspected

As a ☒ Visitor ☐ Student ☐ Stowaway ☐ Crewman ☐ (Other (Specify))

Means of arrival (Name of vessel or airline and flight number, etc.)

Aer Lingus-Flight No. Unknown

Date authorized stay expires (Mo/Day/Yr)

6. None authorized

My immigration visa number is No visa. It was issued by the U.S. Consul on (Mo/Day/Yr)

at (City) (Country)

Name and location of each school attended	Type of school	From Mo/Yr	To Mo/Yr	Highest grade completed	Degree or certificate
Star of the Sea, Belfast	Primary	1958	1962	N/A	N/A
St. Malachy, Belfast	2nd Primary	1962	1965	N/A	N/A
St. Patrick, Belfast	Secondary	1965	1969	N/A	C.S.E. 4

13. What special skills do you have?

I was a plumbers apprentice for two and one half years. I did not complete the program because I was interred without trial in 1972

14a. Social Security No. (if any)

076-50-0652

15. Name of husband or wife (wife's maiden name)

None

16. My husband or wife resides ☐ with me ☐ apart from me (If apart, explain why)

N/A

Address (Apt. No.) (No. and street) (Town or city) Province or state (Country)

Form I-589
(Rev. 10-01-91) N

(OVER)

RECEIVED	ISSUED IN	BIRTHDAY CERT.
		01335

1 of 8

JUL 29 11 25

NEW YORK, N.Y.

19. If no, the U.S. is your spouse included in your request for asylum? ☐ Yes ☐ No (If not, explain why)

N/A

20. If no, the U.S. is spouse making a parole application for asylum? ☐ Yes ☐ No (If not, explain why)

N/A

21. If no, the U.S. are children included in your request for asylum? ☐ Yes ☐ No (If not, explain why)

N/A

22. I have ——— sons or daughters as follows: (Complete all columns as to each son or daughter. If living with you state "with me" in last column; otherwise give city and state or foreign country of son's or daughter's residence):

Name	Sex	Place of birth	Date of birth	Now living at
None				
None				
None				
None				
None				

Relatives in U.S. (other than immediate family)

Name	Address	Relationship	Immigration status
None			

Other relatives who are relatives but outside the U.S.

Name	Relationship	Country where presently located
None		

List all travel or identity documents such as national passport, refugee travel document or national identity card

Document type	Document number	Issuing country or authority	Date of issue	Date of expiration	Cost	Obtained by (how)
None						

23. Why did you obtain a U.S. visa?

N/A

24. If you did not apply for a U.S. visa, explain why not: Because of my political beliefs and activities and my conviction in Northern Ireland for political crimes, I believe I would not be granted such a visa.

25. Date of departure from your country of nationality (Mo/Day/Yr)

2/1/82

26. Are you afraid to return to your country? ☐ Yes ☒ No (If not, explain why)

... or Passport ☐ Yes ☐ No Travel documents ☐ Yes ... or other documents ☐ Yes ☐ No

... why)

No Passport issued
United Kingdom is seeking my extradition from the United States.

... What do you think would happen to you if you returned? (Explain)

See EXHIBIT "A" Attached

... Where was it your home country, to what country did you intend to go?

U.S.A.

... Would you return to your home country? ☐ Yes ☐ No (Explain)

See EXHIBIT "A" Attached

... Have you or any member of your immediate family ever belonged to any organization in your home country? ☒ Yes ☐ No (If yes, provide the following information regarding each organization: Name of organization, dates of membership or affiliation, purpose of the organization, what, if any, were your official duties or responsibilities, and are you still an active member (If not, explain)

The Civil Rights movement, Sinn Fein (Political Party) Wa Fianna Eiredan (Republican Scounts), Irish Republican Army - See EXHIBIT "B" Attached.

... that you believe will result in persecution in your home country ☐ Yes ☐ No (If yes, explain)

See EXHIBIT "C" Attached

... Have you ever been ☐ detained ☐ interrogated ☐ arrested and convicted ☐ imprisoned in any country ☐ Yes ☐ No (If yes, explain the circumstances and the reasons for the detention, dates, location, duration of the detention or imprisonment, reasons for the detention or conviction, and your present status. Also indicate whether you were formally charged with a crime. Indicate the name and address of persons who can verify these statements. Attach documents relating to these incidents, if any)

See EXHIBIT "D" Attached

... If you have already been given asylum or current conditions in your country or these conditions affect your ability to return there, fear that you will be persecuted ☒ Yes ☐ No (If yes, explain) Because of my active participation as an opponent of British rule in the northern counties of Ireland I have been subjected to special scrutiny and persecution by the British Government since 1972.

... Have you or any member of your immediate family ever been detained by the authorities of your home country, country of nationality or last habitual residence ☐ Yes ☐ No (If yes, explain) ☐ Race ☐ Religion ☐ Nationality ☒ Political opinion or ☒ Membership in a particular social group? Specify the circumstances, including names, dates, and places involved, and indicate whether you are still in detention and, if not, how long you were detained. Also indicate whether you have been interrogated, arrested, charged with a crime, or convicted and sentenced in any other country. Explain the circumstances involved and indicate whether these actions are still pending and what documentation you have regarding these actions. Attach any documents relating to these incidents.

See EXHIBIT "E" Attached

... After leaving your home country, have you traveled through (other than in transit) or resided in any other country before entering the U.S.? ☐ Yes ☒ No (If yes, list each country, length of stay, purpose of stay, address, and reason for leaving, and whether you are entitled to return to that country or reside there)

... Why do you fear returning to the U.S.? I believe I could escape the persecution and violence with which I have had to live during my entire life under British rule in the Northern Counties of Ireland. I came here to live a life of peace and without danger to my life.

... Do you have any other reasons for requesting asylum? ☐ Yes ☐ No (If yes, explain)

42. Have you been recognized as a refugee by another country or by the United Nations High Commissioner for Refugees? ☐ Yes ☒ No (If yes, where and when)

43. Are you registered with a consulate or any other authority of your home country abroad? ☐ Yes—Give details ☒ No—Explain why not

44. Is there any additional information not covered by the above questions? (If yes, explain)

I (your name) declare that the above and all accompanying documents are true and correct to the best of my knowledge and belief

Joe P. Dobaty — 6. 27. 83.

(Signature of Applicant) (Date)

(Interviewing Officer) (Date of Interview)

ACTION BY ADJUDICATING OFFICER

☐ GRANTED ☐ DENIED

(Adjudicating Officer) (Date)

Advisory opinion requested ☐ (Date)

EXHIBIT "A"

31. I would be arrested because of my political and religious activities and beliefs. I would be incarcerated for the rest of my life on the basis of a conviction that was obtained against me in a British Court. Said courts are established to try only individuals engaged in political activities in opposition to British rule in the Northern Counties of Ireland. These courts conduct trials without juries and without other normally recognized procedural safeguards.

Once incarcerated my life would be in danger.

EXHIBIT "B"

34. I myself have been a member of the early civil rights movement in 1969. I joined because I did not have any civil rights as an Irish Catholic. Peaceful meetings were broken up by both uniformed British soldiers and soldiers who were out of uniform. People attending these meetings were beaten and shot. In 1971 I became a member of the Fianna Eirerdam, the Republican Scout movement. I was interned without trial in January 1972. Upon my release from prison camp I joined the Irish Republican Army in June 1972.

EXHIBIT "C"

35. I have been an active opponent of British rule in the Northern Counties of Ireland since 1972. I have taken part in peaceful demonstrations against British rule and I have participated in political activities directed towards terminating British rule. I have publicly evidenced my opposition to British rule and as a result have been subjected to political and religious persecution.

EXHIBIT "D"

36. I was arrested on January 1972. I was held for three days and stripped naked, tortured, beaten, and allowed no sleep. I was then interned in a prison camp (Long Kesh) in Belfast. I had no trial, no lawyer, and no charges were lodged against me. I was held on just a piece of paper saying I had been ordered interned without trial. Upon being released on June 1972, I was again arrested and held for questioning for three days for no reason. This sort of harassment continued again and again. The subject of the interrogation was always my political views. Each period of interrogation ended with a warning not to engage in any political activity. I was often slapped and beaten during questioning.

In February 1973 I was arrested and convicted of possession of a starting pistol. I was sentenced to 18 months in Long Kesh prison camp. I was tortured and beaten while in prison. I was released in December of 1973. After my release I was constantly being arrested and interrogated for no reason. Again I joined the Irish Republican Army.

In May 1974 I was arrested for possession of explosives. I was sentenced to 12 years. After serving 6 years, I was released. I joined the Irish Republic Army. In May of 1980, as a part of the civil war in the Northern Counties of Ireland, there was a gun battle with out of uniformed British soldiers. The soldiers, members of the clandestine unit known as the SAS, surrounded a house in which I was present. Without announcing their presence or purpose they opened fire on the house and its occupants. During the battle a British soldier was killed. Along with three others I was arrested and convicted of the murder of the British soldier and other related crimes. I spent thirteen months in prison prior to trial. Before the trial was concluded I escaped from prison. I was convicted and sentenced in absentia to life imprisonment.

As a juvenile, in 1969, I was convicted of housebreaking and shopbreaking. I was sentenced to three and one half weeks in a home for juveniles.

In 1974 I was convicted of an attempt to escape from the Crumlin Road Prison in Belfast.

EXHIBIT "E"

38. Because of my religion I was denied basic human rights. I could not obtain a job, or decent housing. I could not vote. I was constantly subjected to arbitrary arrest, detention and interrogation. Because of my membership with the civil rights movement and the Sinn Fein Party, a legal political group that participated successfully in recent elections, my sister Ann Doherty was arrested and interned in 1973 with no trial.

My father and mother and three other sisters, Maureen, Sharon, and Pat were arrested at various times during the last 12 years, both because of my political activities and their own political beliefs. In 1974 the home of my family was bombed and destroyed by a quasi-official Protestant group.

Details and documentation will be furnished as they become available.

ADDITIONAL CHARGES OF DEPORTABILITY
(filed in deportation proceedings on February 25, 1985)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No. A26 185 231

UNITED STATES OF AMERICA:

IN THE MATTER OF DOHERTY, JOSEPH PATRICK THOMAS
AKA REILLY, JOSEPH, RESPONDENT.

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

ADDITIONAL CHARGES
OF DEPORTABILITY

To: Doherty, Joseph Patrick Thomas
c/o Somerstein and Pike, Esqs.
170 Broadway, Suite 808
New York NY 10038

There is hereby lodged against you the additional charge(s) that you are subject to be taken into custody and deported pursuant to the following provision(s) of law:

Section 241(a)(1) of the Immigration and Nationality Act ("The Act") (8 USC 1251), in that, at the time of entry you were within one or more of the classes of

aliens excludable by the law existing at the time of entry, to wit, aliens who have procured a visa or other documentation, by fraud, or by willfully misrepresenting a material fact. Section 212 (a) (19) of the Act. (8 USC 1182 (a) (19).

Section 241(a)(1) of the Act, in that, at the time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of entry, to wit, aliens who are immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the possession thereof by said Act, or regulations made thereunder, Section 212(a) (20) of the Act. (8 USC 1182(a) (20).

Section 241(a)(1) of the Act, in that, at the time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of entry, to wit, aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime. Section 212 (a) (9) of the Act. (8 USC 1182 (a) (9).

Section 241(a)(1) of the Act, in that, at the time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of entry, to wit, aliens who have been convicted of two or more offenses (other than purely political offenses) regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were five years or more. Section 212 (a) (10) of the Act. (8 USC 1182 (a) (10).

Section 241(a)(1) of the Act, in that, at the time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of entry, to wit, aliens seeking to enter the United States

solely, principally or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States. Section 212 a) (27) of the Act. (8 USC 1182(a) (27).

Section 241(a) of the Act, in that, at the time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of entry, to wit, aliens who are, or at any time have been, members of any of the following classes: aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or [propriety] of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; under Section 212 (a) (28) (F) of the Act. (8 USC 1152 (28) (F).

In support of the additional charge(s) there is submitted the following factual allegation(s) in addition to those set forth in the order to show cause and notice of hearing:

5. Allegation # 3 is deleted and in place and instead—You entered the United States at New York, New York in or about February, 1982.

6. At that place and time of entry you presented in connection with your application for admission to the United States, a passport of the Republic of Ireland issued in the name of Henry J. O'Reilly containing a United States of America non-immigrant visa.

7. At that place and time of entry you willfully misrepresented yourself to be one Henry J. O'Reilly.

8. In truth and in fact you are not one Henry J. O'Reilly but one Joseph Patrick Thomas Doherty.

9. It was then your intention to remain indefinitely in the United States.

10. You were not in possession of a valid immigrant visa or other entry document for permanent residence.

11. You were on June 12, 1981, convicted in Belfast Crown Criminal Court of murder, attempted murder and possession of firearms and ammunition to wit, an M60 machine gun, 7.62 Heckler and Koch rifle, and other weapons.

12. You were on May 16, 1973 convicted in the Belfast Custody Court of Possession of Firearms in Suspicious Circumstances and sentenced to one year imprisonment.

13. You were on September 4, 1974 convicted in the Belfast City Court of Possession of Explosive Substances and sentenced to ten years imprisonment.

14. You were on February 13, 1975 convicted in the Belfast City Court of Prison Breaking with Intent to Escape and sentenced to eighteen months imprisonment.

15. You have been affiliated with the Provisional Irish Republican Army ("PIRA") since 1970.

16. The PIRA is a clandestine terrorist organization involved in attacks on both government civilian institutions and military installations, random violence against innocent civilian populations through indiscriminate bombing campaigns, the murder or maiming of targeted individuals for political reason based on their public opposition to the PIRA, and the use of violence to maintain order and discipline within the PIRA's membership. Its operations have been funded, in part, through the commission of thousands of armed robberies.

February 25, 1985

/s/ Lloyd Sherman
Trial Attorney

TRANSCRIPT OF HEARING IN DEPORTATION PROCEEDINGS
(September 12, 1986)

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[27] JUDGE FOR THE RECORD

This is a continued deportation hearing in the case Joseph Patrick Thomas Doherty; A 26 185 231; in the English language; The law firm of Somerstein and Pike; 170 Broadway; New York, New York 10038 is still representing the alien. We have of Counsel, Arthur Helton, Esquire of Counsel to Somerstein and Pike. All three are present today which is September 12th 1986 at Varick Street. Mr. Helton's address is . .

JUDGE TO MR. HELTON

Q. What sir? Could you just tell it for the record, please?

A. The Lawyer's Committee for Human Rights and it's 36 W. 44th Street, Suite 914, New York, New York 10036.

MR. SOMERSTEIN TO JUDGE

Q. Your Honor, would the record please note the new address for Somerstein and make it 401 Broadway?

A. Sure. So noted.

JUDGE FOR THE RECORD

And, not to be outnumbered, Scott Blackman, Esquire, who is acting trial attorney for the Service at New York 10278 has as co-counsel Allen Page, Esquire, a trial attorney for the Service at New York City. Let the record show that in the absence of the Government attorneys, because Mr. Helton was new to the proceedings, the record of February 25th, 1985 and argument on adjournments of March 19th, 1985 [28] were played back for all to hear, but, there was no Government attorney present.

JUDGE TO MR. BLACKMAN

Q. Now, Mr. Blackman, you were asked whether you wish to hear those recordings and you indicated that you were satisfied to proceed, that your memory was adequate. Correct?

A. That is correct, Your Honor. I declined to listen to the record.

JUDGE TO MR. PAGE

Q. And, Mr. Page, are you interested in listening to the record or could we proceed?

A. Ah, you can proceed, Judge.

JUDGE FOR THE RECORD

Ah, there was some difficulty of playing back the recording of February 25th, 1985 but with the help of our court clerk we were able to succeed in listing.

JUDGE TO MS. PIKE

Q. Correct, Ms. Pike?

A. That is correct, Your Honor.

JUDGE TO MR. HELTON

Q. Mr. Helton?

A. Yes, that's correct.

JUDGE TO MR. SOMERSTEIN

Q. Mr. Somerstein?

A. Yes, Your Honor.

[29] JUDGE FOR THE RECORD

And, the only thing that was accomplished was to recess after the alien, who was sworn, testified that he was not a citizen of the United States. He was born in Belfast, but questioned whether Belfast was part of the United Kingdom and Colonies. That's as far as we went with respect to the pleadings. Subsequently, on March 19, 1985 there was much discussion concerning the extra-

dition proceedings that were pending before the courts and the fact that one judge refused to grant extradition, the Service initiated a mandamus proceeding which had not been completed and the case was adjourned and under the matter of Perez and Jimenez so that the Board decision could be complied with and we adjourned the case until that proceeding was ended. Mr. Blackman, Ms. Pike and Mr. Somerstein have been in constant contact with me; there's no need to go over those dates; we have them, if necessary, wherein there was mutual agreement to continue the case until the extradition and/or mandamus actions were completed. Then Mr. Blackman advised that they were completed and he agreed that we would have a conference and Ms. Pike and Mr. Somerstein and Mr. Blackman were present before me last Friday, which . . or was it Monday . .

MR. SOMERSTEIN TO JUDGE

Our first appearance was last Friday . .

MS. PIKE TO JUDGE

September 3rd.

[30] JUDGE

September 3rd.

MR. SOMERSTEIN TO JUDGE

Q. And, then there was another appearance . .

A. No, it was Friday, the 5th . .

MS. PIKE TO JUDGE

Oh, I'm sorry. That's right.

JUDGE FOR THE RECORD

Friday, September 5th; then, Monday, September 8th and Mr. Blackman indicated that he wasn't ready on September 8th and he wished an adjournment until the 15th of September and Mr. Somerstein indicated that he couldn't be present, he had a previous commitment and

Mr. Blackman graciously stated that all right we can make it for the 12th and we're all here on the 12th; the only additions that we have the fact that Mr. Helton is added to the staff of the alien's representation and Mr. Page is added to the Government's representation. At this point, considering what took place before, the question is whether the alien could plead to the Order to Show Cause, designate the Republic of Ireland, also known as Eire, as the country of deportation and Ms. Pike indicated that Eire is willing to accept him and that would more or less end the case. Mr. Blackman said that because of the language in 243(a) where he acknowledged that the alien had the right to choose a country of deportation but that the Attorney General could refuse to accept such designation if [31] it's in the best interest of this country not to, said that he needed the time so that judgement could be made; and, he advised me this morning that in the presence of all counsel that the Government is still not ready, that the counsel to the Secretary of State wishes to consult with the Attorney General and Mr. Meiss (phonetic spelling) [Meese] is going to be presented with the problem the week of the 15th of September.

JUDGE TO MR. BLACKMAN

Q. Is that correct, Mr. Blackman?
A. That's correct, Your Honor.

JUDGE FOR THE RECORD

And, Ms. Pike indicated that she's felt that the adjournments have reached the end of the line as far as she is concerned, that the Government was the one who always wanted him to be deported and why all of a sudden the switch.

JUDGE TO MS. PIKE

Q. Correct, Ms. Pike?
A. That's quite correct, Your Honor.

JUDGE FOR THE RECORD

Now, Mr. Helton didn't say anything off the record.

JUDGE TO MR. HELTON

Q. Did you want to say anything on the record?
A. Nothing at this time.
Q. Okay.

JUDGE FOR THE RECORD

We can proceed, then, with the point where we left [32] off on February 25th, with respect to the pleadings.

MS. PIKE TO JUDGE

Q. Your Honor, may I interrupt just briefly?
A. Sure.
Q. In the sake of keeping the record precise, Your Honor's remarks were accurate except you did make reference to a mandamus proceeding.
A. Right.
Q. There was no mandamus proceeding. There was a proceeding subsequent to the extradition proceeding initiated by the Government of the United States in the United States District Court for the Southern District of New York. That eventually was resolved adversely to the Government, but, it was not a mandamus proceeding.
A. I stand corrected. Thank you.

JUDGE FOR THE RECORD

With respect to the pleadings, the alien is not present. Ms. Pike indicated that she waives the presence of the alien.

JUDGE TO MS. PIKE

Q. Correct, Ms. Pike?
A. That is correct.

JUDGE TO MR. BLACKMAN

Q. Is there any reason why, Mr. Blackman, the alien has to be present?

A. At this point and time, Your Honor, no.

[33] Q. Very well.

JUDGE FOR THE RECORD

Let's return, then, to Exhibit 1. Allegation one has been conceded. Allegation two was a problem because he stated that he was born in Belfast; he wouldn't acknowledge that that was part of Northern Ireland and refused to state that he was a citizen of the United Kingdom and Colonies; in fact, for the record, Mr. Doherty stated that he was a citizen of Ireland, and, I indicated to Mr. Sherman who was then representing the Service that the Service would have the burden of establishing that he is a citizen of the United Kingdom and Colonies.

JUDGE TO MR. BLACKMAN

Q. Do you have that evidence, Mr. Blackman?

A. I do.

Q. Do you want to offer that?

A. I have the birth certificate of one Joseph Patrick Doherty showing birth in Belfast on January 20th, 1955.

MS. PIKE TO JUDGE

Q. We have examined it, Your Honor.

A. I beg your pardon.

Q. We have examined it.

A. Any objection if it were received as Exhibit 2?

Q. No, Your Honor.

MR. BLACKMAN TO JUDGE

[34] Q. I'll provide copies to Counsel at a later time.

A. Okay. Sure.

Q. You want to do it now? Sure.

A. Okay. Exhibit 3.

Q. Your Honor, I also have an opinion that was solicited from the Library of Congress concerning the citizenship of a person born in Belfast Northern Ireland. That opinion states that such a person is indeed a citizen of the United Kingdom.

JUDGE FOR THE RECORD

This will be marked Exhibit 4 for identification purposes.

JUDGE TO MS. PIKE

Q. And, Ms. Pike, if you want to look at that.

A. I we may, Your Honor.

Q. Any objection to if Exhibit 4 for identification were received as Exhibit 4, Ms. Pike?

A. None, Your Honor.

JUDGE FOR THE RECORD

Exhibit 4.

JUDGE TO MS. PIKE

Q. You concede, then, the accuracy of allegation number 2 on the Order to Show Cause, Exhibit 1, Ms. Pike?

A. I certainly concede that he is recognized to be a citizen of the United Kingdom and Colonies, yes, Your Honor.

[35] Q. Very well. Allegation three has been amended for or actually deleted by allegation five. Let's turn to allegation five and it says that "the alien entered the United States at New York, New York on or about February, 1982. Is that true, conceded? We have to look at Exhibit two now; now we're moving on to Exhibit two, allegation five.

A. That is correct, Your Honor.

Q. And, allegation six, at that place and time of entry the alien presented in connection with his applica-

tion for admission a passport of the Republic of Ireland issued in the name of Henry J. Riley containing a United States of America non-immigrant visa. Is that true?

A. That is correct, Your Honor.

Q. Allegation seven . . let me just note this, hold on . . allegation seven, at that time and place of entry Mr. Doherty willfully misrepresented himself to be one Henry J. O'Riley?

A. That is correct, Your Honor.

Q. Allegation eight, in truth and fact, Mr. Doherty was not one Henry J. O'Riley, but Joseph Patrick Thomas Doherty. Is that true?

A. That is correct, Your Honor.

Q. Allegation nine, it was then Mr. Doherty's intention to remain indefinitely in the United States?

A. That is correct.

Q. Allegation ten, Mr. Doherty was not in [36] possession of a valid immigrant visa or other entry document for permanent residence?

A. That is correct, Your Honor.

Q. Allegation eleven, on June 12th, 1981 Mr. Doherty was convicted in Belfast Crown criminal court of murder, attempted murder and possession of firearms and ammunition towith an M-60 machine, 7.62 Heckler and Kotch (phonetic spelling) and other weapons?

A. Your Honor, I am not prepared to consent to the truth of that allegation today. I would suggest, Your Honor, that, based on the previous admissions, Mr. Doherty's deportability has been established and indeed we concede to this deportability, as we have represented to Your Honor earlier.

Q. In other words, you concede his deportability under Sections 212(a) (19[)] and . . let's see, did they charge him with 19? Well, he certainly, clearly is deportable, based on the fact that he didn't have any entry document. .

MR. BLACKMAN TO JUDGE

Q. Your Honor, the Government would like to proceed in all the allegations and charges.

A. All right. Fine. I have no objections to that. In other words, you're willing to prove allegation number-eleven?

Q. No, I would submit to allegation number eleven as a matter of record in connection with proceeding entitled [37] in the matter of the requested extradition of Joseph Patrick Thomas Doherty by the government of the United Kingdom of Great Britian and Northern Ireland.

A. Well, if the alien is willing to concede deportability, is there any reason why we have to pursue the other allegations?

Q. I think that the basis for his deportability can be a very significant issue. You know, I don't think that we are dealing, Your Honor, with a run of the mill case here, Your Honor. This whole case and the facts and circumstances surrounding it are somewhat unique, as I explained to you earlier, Your Honor, off the record. This is a matter of some concern, not only to the Government of the United States at the highest levels but at to other governments of the world as well.

JUDGE TO MS. PIKE

Q. Let me ask you this. Ms. Pike, are you going to apply for any discretionary relief from deportation?

A. No, Your Honor, we're conceding deportability.

Q. No, no, no. Listen to me. Before I ask the Government to proceed, the question is this, based on what was discussed earlier in the February 25th hearing, the initial hearing with Mr. Doherty being present, you raised the issue of political asylum and. .

A. I'm sorry, Your Honor, yes. .

[38] Q. And, you indicated at that time that you wanted the application to be submitted to the Departmen of State for a further response; so, my question is

this, you say he's deportable and clearly, based on the allegations that you've conceded up to this point, he is clearly deportable under Section 212(a)(20) at the very least. In other words, 241(a)(1), based on the fact that he didn't have the proper documents for which to enter under 212(a)(20). The question is, are you now saying that you no longer wish to apply for asylum and you waiving his right to apply for asylum?

A. That is correct, Your Honor. We would, at this time, withdraw the application for political asylum. The only thing that we would request would, of course, be the opportunity to designate a country.

JUDGE TO MR. BLACKMAN

Q. Uh, huh. Under the circumstances, Mr. Blackman. .

JUDGE TO MS. PIKE

Q. But, just before I address Mr. Blackman again I just want to be sure . . there won't be any application for political asylum and/or withholding of deportation, correct?

A. That is correct.

Q. No application for voluntary departure?

A. That is correct.

Q. In other words, there is no application for relief from deportation that you will be making?

[39] A. That is correct.

JUDGE TO MR. BLACKMAN

Q. Under the circumstances, Mr. Blackman, I think it's a waste of the court's time to take the remainder of the pleadings since she's already conceded he is deportable from the United States and is willing to designate a country of deportation. What difference does it make if she is not going to apply for any discretionary relief?

JUDGE FOR THE RECORD

Let the record show that co-counsel is discussing this issue with Mr. Blackman, that's why he's not responding.

JUDGE FOR THE RECORD

Oh, by the way, I just did notice that the Service is charging him with being deportable under 212(a)(19) as well . . 241(a)(1) as being excludable under 212(a)(19) . . so you can easily find deportability. .

MR. BLACKMAN TO JUDGE

Q. Can we go off the record?

A. Yeh.

JUDGE FOR THE RECORD

. . and, I do so find under both sections, okay.

MR. BLACKMAN TO JUDGE

Q. Can we go off the record, sir?

JUDGE FOR THE RECORD

Go off the record for a moment. All right, let the record show that after an extensive recess of four minutes [40] Mr. Blackman and Mr. Page have returned and. .

JUDGE TO MR. BLACKMAN

Q. Mr. Blackman, you have a comment?

A. Yes, Your Honor, the Government wishes to go forward on allegations and charges contained in the Order to Show Cause. We believe that we should have the opportunity to prove those allegations and charges.

Q. I just don't feel it's necessary and we'll proceed at that point since the alien has already conceded, through his counsel, that he is deportable under Section 241(a)(1) as being inadmissable under Sections 212(a)(19) and 212(a)(20); that the man was seeking admission by fraud and without proper documents.

JUDGE TO MS. PIKE

Q. And, under the circumstances, you concede his deportability, Ms. Pike?

A. Yes, that is correct, Your Honor.

JUDGE FOR THE RECORD

Deportability conceded; designation of country is . .

MS. PIKE TO JUDGE

Republic of Ireland, Your Honor.

JUDGE FOR THE RECORD

Republic of Ireland, also known as Eire.

MS. PIKE TO JUDGE

That is correct, Your Honor.

JUDGE TO MR. BLACKMAN

[41] Q. And, does the Service wish an alternate?

A. Your Honor, the Service, in the first instance, opposes the designation of the Republic of Ireland on the ground that the respondent's deportation to the Republic of Ireland would be prejudicial to the interest of the United States. .

Q. Why?

A. And, the Government further wishes to designate the United Kingdom as an alternate country of deportation.

Q. The United Kingdom and Colonies?

JUDGE FOR THE RECORD

The Service wishes the designation of the United Kingdom and Colonies. I have no objection to that.

MS. PIKE TO JUDGE

Q. Your Honor. .

A. Wait. Before we proceed we'll hear from both of you.

JUDGE TO MR. BLACKMAN

Q. Why would his deportation to Eire, excuse the shortened term, be prejudicial to the interest of this government?

A. Your Honor, as I had indicated to you at the outset and as I'm sure you're aware, this is not your ordinary case. The respondent, quite simply, is a terrorist. He blasted his way out of a prison in Northern Ireland; absconded to the Republic of Ireland; obtained a fraudulent [42] passport in the Republic of Ireland; came to the United States and was living unlawfully in the United States. The respondent was in prison in Northern Ireland, having been convicted of the crime of murder, possession of a weapon, membership in a pr[o]scribed organization, that organization being the [Provisional] Irish Republican Army. As I'm sure Your Honor is aware, the Board of Immigration Appeals in matter of McMullen has characterized the [Provisional] Irish Republican Army as a clandestine terrorist organization committed to the use of violence to achieve its objectives. McMullen is Interim Decision 2967 . . it's as yet unbounded volumn eighteen. The United States has taken a very firm stand against world wide terrorism. Not only terrorism involving the highjacking of the aircraft in Pakistan, the bombing of buildings in the Middle East but also, indiscriminate killing in Northern Ireland and, in fact, acts of terrorism anywhere in the world. As you know, the government of Great Britain sought to extradite respondent for his crimes from the United States. That did not succeed. The United States has an obligation to the world community to see that terrorist are, in fact, punished for their deeds. To allow Mr. Doherty, the respondent, to leave the United States, to go to the Republic of Ireland where it's not all clear that he will be punished for his crimes and he was, in fact, convicted of the crimes of murder and other acts of terrorism would be contrary to the public interest as is contrary to the stated [43] policy of this government to fight terrorism. I have a few documents that I would like to submit for Your Honor's consideration which may give you a sense of the Government's stance and the Government's position. This is a copy of a speech given by Secretary of State Shultz on

October 25th, 1984 on the subject terrorism and the modern world. He speaks about the terrible crimes of terrorist and the commitment of the United States Government to combat terrorism and to insure that terrorist who apprehended are, in deed, punished. And, I would submit that for your consideration, Your Honor.

JUDGE TO FOR THE RECORD

Does Ms. Pike have . . this is non-evidentary and what I'm going to do is mark the non-evident[i]ary documents with lettered Exhibits so that they are not confused, if there is an appeal, with the numbered Exhibits which are evident[i]ary. So, I'm marking this as Exhibit A. It's solely in the matter of a brief argument by the Government.

JUDGE TO MS. PIKE

Q. Correct? Ms. Pike, you understand?
A. Yes, Your Honor.
Q. Okay.

JUDGE FOR THE RECORD

There is no objection and you can note that.

JUDGE TO MS. PIKE

Q. Do you have a copy of this, Ms. Pike?
[44] A. I do not.
Q. Are you interested in reading this?
A. Not particularly, Your Honor.

JUDGE TO MR. BLACKMAN

Q. I don't know how relevant this is, that's the point, Mr. Blackman.

A. Your Honor, I suppose that you will have to determine the relevance of it and give it the appropritae weight that you feel it deserves.

Q. Fine. It's in the record as Exhibit A, non-evident[i]ary record.

A. Thank you. Your Honor, I would also like to submit for your consideration a statement by Abram D.

Sofare (phonetic spelling) [Sofaer], legal advisor for the Department of State before the Senate Committee and Relations August 1, 1985. A statement that was made in connection with the extradition supplementary treaty concerning the extradition treaty between the government of the United States of America and the government of the United Kingdom and Northern Ireland. I believe this again is indic[ative] of the Government's stance against terrorism and our commitment to fight terrorism throughout the world. And, I would like to note that Judge [Sofaer] expresses his frustration when he says in such cases the U.S. is limited to deporting such persons to some third country where they can continue to [elude] justice. I would submit that Judge [Sofaer] was under, with all due [45] respect, in this apprehension . . that it is, in fact, for you to determine that the respondents' deportation to the Republic of Ireland would be prejudicial to the interest of the United States Government. I would ask again that you receive that and . .

Q. Exhibit B. You have no copy for Ms. Pike?
A. No, I regret we do not, Your Honor.

JUDGE TO MS. PIKE

Q. Ms. Pike, you will be entitled to a copy of these documents if you wish.
A. Thank you, Your Honor.

MR. BLACKMAN TO JUDGE

Q. Your Honor, I's also like to submit some selected articles for your perusal from various newspapers which, again, stress commitment of the United States in the matter of terrorism and terrorist. Again, I regret, I have no copies of that.

JUDGE FOR THE RECORD

I have before me a New York Times article . . it looks like an editorial, the extradition thicket of December of 1984, where Mr. Doherty is mentioned by name; and, also, an article by the Philadelphia . . an article in the

Philadelphian Inquirer of March 24, 1986 concerning . . the title of Irish Free Woman Sought by Great Britain. Thirdly, there is an article in the New York Post of May 27, 1986 "U. S. British exposition treaty is part of the war on terrorism. And, [46] then, there is a New York Times article of July 18, 1986 "patched by Britain on extraditions backed by Senate, measure is retroactive; treaty favored 8710 allows return of IRA fugitives and certain terrorist; and, lastly, an article . . it doesn't indicate where this if from, but it says, "ABA hears Britis[h]terrorism views; Thacher calls for cooperation and relentless opposition". These articles . .

JUDGE TO MS. PIKE

Ms. Pike, you will be entitled of them if you wish.

JUDGE FOR THE RECORD

Will be marked as a Joint Exhibit C.

JUDGE TO MR. BLACKMAN

Q. Your Honor, I have one final document to offer you. It's a copy of an affidavit that was submitted in connection with the extradition proceedings. I don't submit it as much for what's contained in the affidavit portion itself but for the attachments which constitute statements on terrorism that were adopted at the Economic Summit Conferences held in [Ottawa] on July 21, 1981 and London June 9, 1984 and I think that it's important to note that in the June 9, 1984 conference one of the p[ro]posals discussed was consultation as far as possible . . consultation as far as possible, cooperation over the expulsion from their countries of know[n] terrorists, including persons of diplomatic status involved in terrorism; and, I submit that [47] also for your perusal. And, again, I apologize, I have no copies for Counsel.

JUDGE TO MS. PIKE

Q. Are you familiar with this, Ms. Pike?
A. I have seen it before, yes, Your Honor.

JUDGE FOR THE RECORD

Exhibit D.

MR. BLACKMAN TO JUDGE

Q. Your Honor, I think that I would finally submit that . . you've indicated that the material that I have submitted to you, while informative, may not be evident[i]ary in nature.

A. Correct.

JUDGE FOR THE RECORD

Let the record show that copies are being made for Ms. Pike at this time, Exhibits A through D.

MR. BLACKMAN TO JUDGE

Q. In a sense, what you have asked me to do is to prove what I say, that it's prejudicial to the interest of the Government that respondent be removed to the Republic of Ireland. In our pre-hearing conference, which I don't know if it was entered on the record, I indicated to you that this matter is of some concern at the highest levels of government and that it was under consideration by the legal advisor to the State Department and will be under the personal review of Attorney General [Meese] this coming week. I would suggest [48] again that we adjourn the proceedings for a brief period of time to allow the Government to present something in the nature of proof on this issue. And, I say again that given the length of the proceedings and the amount of litegation that has been involved on various aspects of the case, I don't think that it's unreasonable to grant a short adjournment on this issue which I think that you have to agree is a significant one.

JUDGE TO MS. PIKE

Q. Now, Ms. Pike, there were two questions that you can address if you'd like.

A. Yes.

Q. The issue has been raised by the Service that it would be prejudicial to this country by removing the alien to Eire and the second issue is the alternate designation of the United Kingdom and Colonies. Do you wish to address either or both of those issues?

A. Yes, Your Honor. Relative to the issue of Mr. Doherty's designation of the Republic of Ireland, I would like to submit for the record documents that will clearly establish his connection with the Republic of Ireland.

Q. Oh, I'm satisfied that . .

A. I understand that, Your Honor, but I would like to submit them for the record so that there is no question about his status, given the Government's submission of their memorandum. I would like to submit for Your Honor an [49] affidavit setting out his Irish citizenship. The Irish Nationality and Citizenship Act of 1956 . . the. .

Q. Well, I would say that. .

A. I'd like to finish if I might, Your Honor . . the Irish Constitution and a certified copy of Mr. Doherty's birth certificate because I think his connection with the Republic of Ireland is central to Mr. Blackman's argument. Mr. Doherty is doing nothing more than designating a country which is the country of his birth and of his citizenship. He has strong ties with it and therefore it seems to me that it becomes commensurately more difficult to argue; that the accomplishment of his deportation to that country is prejudicial to the interest of the United States. He is not designating a third country, foreign to him or foreign to these proceedings; therefore, I would like the record to indicate that these Exhibits have been received and I have copies for Mr. Blackman.

Q. Is this on argument? In other words, it would be Exhibit E . . just like . . in other words, it's not going to be evident[i]ary. This is solely on the isuse . . a brief to the court. Is that what you're saying?

A. It goes to his designation, Your Honor.

Q. I don't think that there was any issue as to the designation. I'll take it as argument.

A. All right. Very good, Your Honor. Would you have them marked in that regard?

[50] Q. Yeh.

JUDGE FOR THE RECORD

Exhibit E.

MR. BLACKMAN TO JUDGE

Q. No objection, Your Honor.

A. Very well.

JUDGE TO MS. PIKE

Q. Could I have them, please?

A. Yes. That's your set, Your Honor.

MS. PIKE TO MR. DOHERTY

Q. Mr. Doherty, this is your set, absent the birth certificate, that's gives you . . of course, yourself . . already marked earlier.

JUDGE FOR THE RECORD

Since Ms. Pike has already identified these documents I won't repeat it for the record.

JUDGE TO MS. PIKE

Q. Ms. Pike, do you wish to address orally the issue that was raised by Mr. Blackman that it would be prejudicial to send Mr. Doherty back to Erie?

A. I do, briefly, Your Honor. I would simply like to point out that we've been treated to a rather provocative recitation of Mr. Doherty's history and a succession of newspaper articles having to do with the position of the present administration on what Mr. Blackman refers to as terrorism. It seems to me, Your Honor, that the issue before [51] you is not terrorism but rather the impartial administration of the immigration laws of this

country. We are before Your Honor in a proceeding brought by the Immigration and Naturalization Service to accomplish the deportation of Mr. Doherty. We are here before Your Honor today because we have conceded his deportability. The Service now takes the position that he should not be able to be deported to other than the United Kingdom because the British government seeks his extradition to the United Kingdom and was unsuccessful in obtaining it through an extradition proceeding that had, it is true, a tortuous history, and I would add with result, adverse to the Government at every level of those proceedings. That being so, Your Honor, the argument put before you today, that it would be prejudicial to the interest of the United States to deport Mr. Doherty to the Republic of Ireland, is simply an attempt to accomplish, through the immigration laws, what has not been able to be accomplished under the appropriate set of laws and statutes that govern extradition. That is an improper [*sic*] of the immigration laws under the circumstances and the effort to argue that his deportation to the Republic of Ireland flows . . I'm sorry, the argument that it would prejudicial to deport him to the Republic of Ireland flows from the Government's inability to extradite him. It should not be permitted to frustrate the immigration laws of the United States. He is deportable. We have conceded that. He should [52] be deported. It is that simple.

Q. And, what about the other issue about the alternate designation? What if Eire doesn't accept him?

A. Your Honor, we are assured that Ireland will accept him and that there is no basis under Irish law not to accept him.

Q. All right. So, you have no objection, then, to the United Kingdom and Colonies being designated as an alternate?

A. That's correct, Your Honor.

Q. Now, the only issue that I have remaining is whether Mr. [Meese] should be given any opportunity to present evidence that it would prejudicial to the best interest of this country to send him to Ireland, to Eire. Do you object to Mr. [Meese] giving me a statement on that, or his office?

A. For the record, I would object to a further adjournment for that purpose, Your Honor.

Q. I think, in good conscience, I have to agree with Mr. Blackman that there has been a very, very long proceeding here and a few more days, I can't see would upset what you're seeking. Next Friday will be the deadline to receive any information . . at this same hour.

JUDGE TO MR. SOMERSTEIN

Q. Mr. Somerstein?

A. Well, Your Honor, we've finished the proceeding.

[53] Q. I haven't even heard from Mr. Helton.

A. Mr. Blackman has been requesting time to get a statement of the Government's position since last Friday and these proceedings have been long and tortuous. They've been over three and one half years, now. Mr. Doherty, as Ms. Pike said, has prevailed at every step of the way. .

Q. I agree.

A. . . but, has remained in detention. He now. .

Q. Correct.

A. . . concedes his deportability so he can go home to his family; so he can go home to the country of his birth. Mr. Blackman has presented extensive statements reflecting the position of this administration to this court. It seems that there is little else that could be said by anyone on the subject of international terrorism that is not already before Your Honor. .

Q. No, but, I still haven't heard anything specific why it would prejudicial to this country to send him to Eire and Mr. Blackman says that Mr. [Meese] would consider that during the week and if he comes up with anything, fine, and we'll consider it and if he doesn't, then,

I'll enter my order Friday morning. It's as simple as that.

A. Your Honor, Mr. Blackman asked for this adjournment to today, it seems to me, for exactly for that purpose. And, every day of delay now works to the substantial prejudice of Mr. Doherty. It results in his [54] continued detention.

Q. I understand that, but, I think it . . personally, it's a reasonable request considering the length of time involved. We did finish the hearing. The hearing is finished for all intents and purposes; and, all we're waiting for is one piece of information that one Government could furnish me. Maybe there is something neither you nor I have heard that could influence that decision . . whether I designate that country.

A. Your Honor, my only request, then, would be for a briefer adjournment. It seems that this matter has been the subject of Mr. [Meese's] attention for some three years now.

Q. I'm sure Mr. Blackman would be the first to tell you he wants to finish this case as quickly as possible.

JUDGE TO MR. BLACKMAN

Q. Mr. Blackman, all I can employ is that you seek the answer from . .

A. To the best of my ability, Your Honor.

Q. . . as quickly as possible and as soon as you hear if you could contact Ms. Pike or Mr. Somerstein and Mr. Helton and myself, I'd appreciate it.

A. I will do that, Your Honor.

JUDGE FOR THE RECORD

Next Friday at 8:15, which is the 19th, and I promise we'll have an answer and we'll render the decision at that time.

[55] JUDGE TO MR. SOMERSTEIN

Q. In other words, I'm not going to reserve any decision, Mr. Somerstein. Do you understand?

A. Yes.

JUDGE TO MS. PIKE AND MR. HELTON

You will have a decision on Friday.

MR. SOMERSTEIN TO JUDGE

Q. And, I certainly understand that, Your Honor.

A. Okay. Very well.

JUDGE FOR THE RECORD

Hearing is closed . . ah, adjourned.

HEARING IS ADJOURNED

AFFIDAVIT OF TERRELL E. ARNOLD
(dated June 14, 1984)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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83 Cr. Msc.

IN THE MATTER OF THE REQUESTED EXTRADITION OF JOSEPH PATRICK THOMAS DOHERTY BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN and NORTHERN IRELAND

WASHINGTON, D. C.) ss.:

Terrell E. Arnold, being duly sworn, deposes and says:

1. I am Deputy Director, Office for Counter-Terrorism and Emergency Planning in the Department of State and have held that position since June 1983. I have been duly authorized to express to this Court the views of the Department of State with respect to the requested extradition of Joseph Patrick Doherty ("Doherty") and the claimed applicability of the political offense exception in this case.

2. In the opinion of the Department of State the political offense exception is particularly inappropriate to the facts of this case because Doherty's crimes, as the record indicates, include (i) a murder that was carried out by forcibly taking over a private dwelling and taking civilian citizens hostage, and (ii) aggravated assault in connection with Doherty's escape from lawful custody.

3. The application of the political offense doctrine to deny extradition in this case could cause damage in relations between Great Britain and the United States. Damage to U.S. foreign relations, however, would not

necessarily be limited to Great Britain but could extend to other countries with strong national policies against terrorism. Moreover, application of the political offense doctrine to deny extradition would impede the diplomatic efforts of the United States to suppress international terrorism and undermine efforts by this country to foster multilateral cooperation in this area, an essential condition to the eradication of spreading international terrorist activity.

4. In this connection, an important expression of U.S. anti-terrorism policy may be found in the "Statement on Terrorism" issued on July 21, 1981 at the Ottawa Summit on behalf of the participants, which included the President of the United States and the Prime Minister of Great Britain. That statement, a copy of which is appended hereto as an Exhibit, sets forth the serious concerns of the Summit participants regarding the importance of denying sanctuary to terrorists. Those views were reiterated during the recent Economic Summit in London. (See attached Communique dated June 9, 1984.) In the opinion of the Department of State, application of the political offense exception to deny extradition in this case would in practical terms enhance the risk that the United States would become a haven for terrorist fugitives. Moreover, such an application of the political offense doctrine to prevent Doherty's extradition would provide a useful precedent to terrorist organizations operating against this country who, after committing crimes here, may flee abroad and claim that their crimes in this country were political offenses.

/s/ Terrell E. Arnold

Sworn to before me this
14th day of June, 1984

/s/ [Illegible]
Notary Public
My Commission Expires June 15, 1984

TRANSCRIPT OF HEARING IN DEPORTATION PROCEEDINGS
(September 19, 1986)

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[56] JUDGE FOR THE RECORD

Resuming, I hope for the last time, the case of Joseph Patrick Thomas Doherty; A 26 185 231; still represented by the office of Pike and Somerstein of 401 Broadway; New York, New York 10013. Allen Page is here to assist Mr. Blackman and therefore the Government on September 19, 1986.

JUDGE TO MS. PIKE

Q. Ms. Pike, you're speaking for the alien?
A. Ah, yes, Your Honor.
Q. And, you're waiving the presence of Mr. Doherty again?
A. That' so, Your Honor, and I would also add that Mr. Helton, of course, continues his presence in the case but he is in Amsterdam today.
Q. Sure.

JUDGE TO MR. BLACKMAN

Q. Mr. Blackman, you have no objection to Mr. Doherty's absence being waived?
A. I do not, Your Honor.

JUDGE FOR THE RECORD

We continued the case, as we all know, so that the Government could advise on the issue of discretion, with respect to the designation of Eire as the country of deportation designated by the alien.

JUDGE TO MR. BLACKMAN

[57] Q. Anything, Mr. Blackman?
A. Your Honor, the Government has nothing further to submit to you at this time. I would advise you, Your

Honor, that in a telephone conversation just a few moments ago with Paul Schmit, the acting general counsel of the Immigration and Nat[ur]alization Service, I was advised that this matter still is under review at the highest levels of the Justice Department. At this time, Your Honor, I would only. .

JUDGE FOR THE RECORD

Off the record.
Back on the record.

MR. BLACKMAN TO JUDGE

A. Your Honor, at this time I would just reiterate the Government's concern that the respondent's deportation to Eire or the Republic of Ireland would, in deed, be prejudicial to the interest of the United States and be inconsistent with the Government's stated policy to combat world-wide terrorism; and, beyond that, Your Honor, I have nothing further.

JUDGE TO MS. PIKE

Q. Ms. Pike, do you have anything to add or do you rest?
A. Your Honor, I would simply stand with the arguments I raised at our last hearing.
Q. You rest, then?

[58] MR. BLACKMAN TO JUDGE

A. The Goverment rest.

JUDGE TO MS. PIKE

Q. Rest?
A. Yes, Your Honor.

JUDGE RENDERS ORAL DECISION

JUDGE TO MS. PIKE

Q. Do you accept this as a final decision, Ms. Pike?
A. I do, Your Honor.

JUDGE TO MR. BLACKMAN

Q. Mr. Blackman?
A. The Government reserves appeal, Your Honor.

JUDGE FOR THE RECORD

Let's see. Today is the 19th, so that's the 29 . . reserved by Service to September 29, 1986.

JUDGE TO ATTORNEYS

Q. Anything further by either side?

MS. PIKE TO JUDGE

A. No, Your Honor.

JUDGE TO MR. BLACKMAN

Q. Mr. Blackman?
A. Nothing else, Your Honor.

JUDGE FOR THE RECORD

The hearing is closed.

THIS HEARING IS CLOSED.

AFFIDAVIT OF STEPHEN S. TROTT
ASSOCIATE ATTORNEY GENERAL
(dated February 19, 1987)

WASHINGTON, D.C.) s.s.

STEPHEN S. TROTT, being duly sworn, deposes and says:

1. I am the Associate Attorney General of the United States and have been so since September 12, 1986. As such, I am charged by the Attorney General with, *inter alia*, the responsibility of overseeing the operations of the United States Department of Justice's programs and initiatives concerned with criminal matters and matters involving counter-terrorism.

2. Pursuant to Title 8, United States Code, Section 1253(a), "[t]he deportation of an alien in the United States . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, *unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.*" * * * (Emphasis added).

3. Joseph Patrick Thomas Doherty, the subject of the deportation proceedings pending before this body, has designated the Republic of Ireland as the country to which he wishes to be deported.

4. As Associate Attorney General, I conclude that deporting Joseph Patrick Thomas Doherty to the Republic of Ireland would be prejudicial to the interests of the United States. I arrive at this conclusion based upon the facts in this case as set forth in paragraphs 5 through 7, and the policy considerations set forth in pargrapahs 8 through 11.

5. In proceedings on the request by the United Kingdom for the extradition of Doherty under the Treaty on Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, signed at London June 8, 1972 (entered into force

January 21, 1977) 28 UST 227, TIAS 8468 (the Treaty), United States District Judge John E. Sprizzo found that Doherty was a member of the Provisional Irish Republican Army (PIRA). Doherty testified that on May 2, 1980, he and several members of the PIRA:

> . . . took over a house at 371 Antrim Road in Belfast, and awaited a British Army convoy. Some three or four hours later, a car stopped in front of 371 Antrim Road and five men carrying machine guns emerged. These men, members of the Special Air Service of the British Army ("SAS"), and Doherty's group fired shots at each other.
>
> In the exchange of gunfire Captain Herber Richard Westmacott, a British army captain, was shot and killed. • • •

In Re Doherty, 599 F. Supp. 270, 272 (S.D.N.Y. 1984).

6. Doherty and his fellow gunmen were apprehended, tried, and convicted of murder, attempted murder, possession of firearms and ammunition, and belonging to a proscribed organization. On June 10, 1981, after their trial, but before entry of judgment, Doherty and a number of his PIRA comrades escaped from prison, taking a prison guard hostage, beating him, and inflicting injuries requiring 26 sutures to his head. All of the escapees except Doherty were later apprehended in the United Kingdom. Doherty was subsequently sentenced to life imprisonment in the United Kingdom.

7. Efforts to extradite Doherty from the United States were unsuccessful, because the district court concluded that the crimes Doherty committed in Northern Ireland were political offenses within the meaning of Article V (1) (c) (i) of the Treaty. *In Re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984). The United States was unsuccessful in its attempt to obtain collateral judicial review of this determination. *United States v. Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd.*, 786 F.2d 491 (2d Cir. 1986).

8. It is the position of the United States Government that the crimes committed by Doherty—hostage taking, murder, and assault with intent to commit murder—are terrorist offenses. This position is reflected in the testimony I gave concerning the Supplementary Extradition Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland (entered into force December 23, 1986) before the United States Senate Committee on the Judiciary, on November 5, 1985. This position is also reflected in the testimony on the same subject given the same day before the same body by Judge Abraham D. Sofaer, Legal Adviser for the United States Department of State.

9. It is the policy of the United States that those who commit terrorist offenses should not escape due punishment through international flight. If Joseph Doherty is permitted to go to the Republic of Ireland, where he will not be punished for his role in the events of May 20, 1980, it will signal to other terrorists that they may commit terrorist offenses, flee to the United States to avoid prosecution or punishment, then select a country to which to be deported where they will be safe from punishment for their crimes. The United States is currently encouraging several foreign countries to arrest and surrender to us terrorists accused of acts of terrorism against citizens of the United States, including Abu Abbas, the mastermind of the *Achille Lauro* incident. Therefore, it would be prejudicial to the interests of the United States to be perceived as aiding a person who has committed terrorist offenses to escape punishment.

10. It is the intention of the United States Government to protect its citizens against the sort of terrorist acts that have been specifically directed against United States citizens in recent years. In my view, to achieve this protection requires this Government to demonstrate by its acts in the international arena the resolve to deny terrorists any possible benefit from flight to the United States. It is an important expression of the United States policy against terrorism that we deny sanctuary to ter-

rorists. (See the Affidavit of Terrell E. Arnold, Deputy Director, Office for Counter-Terrorism and Emergency Planning, Department of State, June 14, 1984; a copy of which is attached.)

11. I believe that this posture should be manifested not only in this Government's adherence to, and advocacy of, international agreements on terrorism, but in the administration of this country's immigration laws as well. If Doherty is permitted to select a country of deportation where he will escape punishment for murder, attempted murder, illegal possession of firearms, and membership in a prohibited terrorist organization, it will signal other terrorists that when they are apprehended within the United States, the Government is powerless to prevent them from choosing to be deported to countries where they may evade the consequences of their acts. In view of the discretion in deportation matters granted the Attorney General by Congress in Title 8, United States Code, Section 1253(a), the Government must not permit this perverse result.

12. Wherefore, I conclude that it would be prejudicial to the interests of the United States to deport Joseph Patrick Thomas Doherty to the Republic of Ireland and that he should be deported to the United Kingdom, pursuant to Title 8, United States Code, Section 1253(a). *United States v. Shaughnessy*, 114 F. Supp. 791, 794 (S.D.N.Y. 1953).

Feb. 19, 1987
Date

/s/ Stephen S. Trott
STEPHEN S. TROTT
Associate Attorney General

Sworn to before me this
19th day of February, 1987.

/s/ Audrey J. Williams
Notary Public

MOTION OF RESPONDENT
TO REOPEN OR RECONSIDER
(filed in deportation proceedings on December 2, 1987)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

File No. A26 185 231 (NYC)

IN THE MATTER OF JOSEPH PATRICK DOHERTY, RESPONDENT

MOTION OF RESPONDENT TO REOPEN
OR TO RECONSIDER

Upon the record in these proceedings, the attached affidavits of MARY (MAUREEN) DOHERTY, sworn to on December 2, 1987, and MARY BORESZ PIKE, also sworn to on December 2, 1987, and the exhibits attached thereto, the respondent JOSEPH PATRICK THOMAS DOHERTY, through his counsel, moves the Board of Immigration Appeals (BIA) for an order reopening the deportation proceedings and remanding this case to the Immigration Judge for the purpose of a hearing on respondent's claims for asylum under section 208 of the Act, withholding of deportation under section 243(h), and for redesignation of country of deportation under section 243(a).

Respondent's motion is made pursuant to 8 C.F.R. 3.2, 3.8, and 242.22.

Should the deportation order entered herein on September 19, 1986, become final during the pendency of the

instant motion, respondent requests the Board to stay the execution of said order pending its determination of the motion and also pending the filing and disposition of any petition for review or appeal by respondent.

/s/ Mary Boresz Pike
SOMERSTEIN & PIKE
By: MARY BORESZ PIKE
401 Broadway, 27th Floor
New York, New York 10013
(212) 925-3232

Attorneys for Respondent
Joseph Patrick Thomas Doherty

Dated: December 2, 1987
New York, New York

Of Counsel:

ARTHUR C. HELTON
Lawyers Committee for
International Human Rights
330 Seventh Avenue
10th Floor North
New York, New York 10001
(212) 629-6170

**AFFIDAVIT OF MARY BORESZ PIKE,
COUNSEL FOR RESPONDENT,
AND SELECTED EXHIBITS THERETO
(dated December 2, 1987)
(filed with Motion of Respondent to Reopen or Reconsider)**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

File No. A26 185 231 (NYC)

IN THE MATTER OF JOSEPH PATRICK DOHERTY, RESPONDENT

AFFIDAVIT OF MARY BORESZ PIKE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARY BORESZ PIKE, being duly sworn, hereby deposes and says that:

1. The respondent JOSEPH PATRICK THOMAS DOHERTY is represented by the firm of Somerstein & Pike; I am a partner in that firm.

2. I make this affidavit in conjunction with the respondent's motion to reopen or to reconsider.

3. The motion is based on the administrative record in these proceedings, the affidavit of Mary (Maureen) Doherty, the instant affidavit, and the supporting documents appended to the Doherty and Pike affidavits.

4. The motion to reopen or to reconsider is based on circumstances which have arisen subsequent to all prior proceedings had herein.

5. The event warranting the motion did not occur until December 1, 1987, and this being so, the evidence offered herein was not available and could not have been discovered or presented at any former hearing.

6. For purposes of the instant motion, the following statements are made: respondent is not the subject of any pending criminal proceeding under section 242(e) of the Act; and, warrants for respondent's arrest were issued some years ago by the Government of the United Kingdom and Northern Ireland, charging respondent with various offenses it alleged to be criminal in nature. On the basis of these charges, which related to an escape by respondent from the Crumlin Road Jail in Belfast, Northern Ireland, in 1981, and others on which respondent had already been sentenced to life imprisonment pursuant to trial in a non-jury Diplock court proceeding, the Government of the United Kingdom of Great Britain and Northern Ireland requested respondent's extradition. In conjunction with the extradition proceedings, the circumstances of the offenses were examined. United States District Court Judge John E. Sprizzo concluded that the offenses were neither violative of international law nor inconsistent with international standards of civilized conduct. He further determined that the facts of Mr. Doherty's case "present the assertion of the political offense exception in its most classic form." *Matter of Doherty by the Government of the United Kingdom*, 599 F.Supp. 270, 274, 275, 276 (S.D.N.Y. 1984). On the basis of these determinations, Judge Sprizzo entered an order denying the request for Mr. Doherty's extradition, thereby barring his return to the United Kingdom, on the ground that the offenses for which extradition was sought were not common crimes but rather political offenses.

7. The government's subsequent efforts to have the order barring extradition to the United Kingdom reversed were unsuccessful, and the government has declined to file a new request for Mr. Doherty's extradition, an avenue which has at all times been open to it in service of its pursuit of Mr. Doherty's return to the United Kingdom. The United States Court of Appeals for the Second Circuit explained this default by observing that the government's failure to pursue this obvious avenue of relief was a function of its fear that it would only lose again. *See United States v. Doherty*, 786 F.2d 491, 500 (2d. Cir. 1986).

8. The government's time to seek review of that Second Circuit decision expired on September 2, 1986. Consequently, the order previously entered by Immigration Judge Howard I. Cohen, which had stayed the deportation proceedings then pending against Mr. Doherty until such time as the extradition proceedings were finally determined, lapsed. The extradition proceedings had been finally determined, and the years of litigation had resulted in successive judgments which operated to bar Mr. Doherty's removal to the United Kingdom.

9. On September 3, 1986, Mr. Doherty's counsel notified the presiding immigration judge that they wished to appear before him.

10. The requested conference was had on September 5, 1986, and through counsel, Mr. Doherty advised the immigration judge that he wished to consent to deportation.

11. Mr. Doherty exercised his substantive right under the Immigration and Naturalization Act to designate a country of deportation, designating the Republic of Ireland, which is his country of citizenship, as well as the country where he had been living and from which he departed for the United States.

12. The Immigration and Naturalization Service (INS) opposed Mr. Doherty's designation on the ground that it would be prejudicial to the interests of the United States

for Mr. Doherty to be reported other than to the United Kingdom.

13. In making his designation, Mr. Doherty was aware of and relied on the facts: that 8 U.S.C. 1253 conferred upon him the right to designate the country of deportation; that this right is a substantive right; that in the entire history of the statute no potential deportee's designation of country had ever been rejected on the ground that deportation thereto would be prejudicial to the interests of the United States; that Ireland, his designated country and country of citizenship, would accept him and gave written confirmation that it would do so; and, finally, that these circumstances in combination rendered the Service's designation of the United Kingdom a mere formalism.

14. In tandem with the immigration judge's determination of deportability, Mr. Doherty's counsel, in reliance on the above-referenced factors, withdrew his claims for relief from deportation, previously-lodged on June 28, 1983.

15. On September 19, 1986, the immigration judge entered an order directing that Mr. Doherty be deported to Ireland.

16. The immigration judge's order was entered only after the Service had been given repeated adjournments, over respondent's objections, to enable it to come forward with evidence of the prejudice to the interests of the United States that the Service claimed would be occasioned unless the immigration judge's decision was reversed.

17. Despite frequent statements to the immigration judge by the Service that Mr. Doherty's case was "unique," was being considered at the "highest levels of government," and would "be under the personal review of Attorney General Meese" the coming week, the INS never presented any evidence to support its claim of prejudice. Nor did it, on September 19, 1986, the date to which the hearing had been most lately adjourned by the immigration judge at its request, ask for a further adjornment. It merely stated it had nothing further to submit and rested its case. Record at 37, 47, 57-58.

18. Subsequent to the immigration judge's September 19, 1986, decision, the Service filed a notice of appeal.

19. Pursuant to the Service's notice of appeal and to a motion to reopen lodged by it subsequent to the Board's decision adverse to it, the Board has had occasion twice to examine the validity of the order entered on September 19, 1986. On March 11, 1987, and May 22, 1987, it rendered decisions adverse to the Service.

20. The Service thereupon caused the matter to be referred to the Attorney General for review pursuant to 8 C.F.R. 3.1(h)(1)(iii), and it was transmitted to him by the Board under cover of memorandum dated May 29, 1987.

21. Having received notice of the requested referral on June 1, 1987, respondent's counsel immediately called the Attorney General's attention to the fact that Mr. Doherty's *fifth* year of detention without bail was soon to begin and, further, asked to be advised of the procedures which would govern his review. *See* Letter of June 4, 1987, to Attorney General Edwin Meese III from Mary Boresz Pike, appended hereto as Exhibit 1. Five months later, the office of respondent's counsel received a letter dated October 28, 1987, from Charles J. Cooper, assistant attorney general, advising that the Attorney General "has granted the request of the Immigration and Naturalization Service . . . that he review the decision of the Board of Immigration Appeals involving the deportation of Mr. Doherty." *See* Letter dated October 28, 1987, from Charles J. Cooper to Mary Boresz Pike, appended hereto as Exhibit 2.

22. The letter further advised that although Mr. Doherty had no statutory or constitutional right to present evidence or otherwise have a hearing before the Attorney General, the Attorney General had decided that it would be "appropriate" to permit Mr. Doherty "the opportunity to present his views in writing."

23. Having taken five months to advise Mr. Doherty that he had available not quite 30 days within which to respond, the letter directed that Mr. Doherty submit his brief "on or before December 1."

24. The Service and the Attorney General, aware of the impending implementation of a major change in Irish extradition law that would effectively operate to insure Mr. Doherty's return to the United Kingdom, have calculatedly, willfully, wantonly, and baselessly delayed and impeded the expeditious conduct of these proceedings so as to insure that the order directing Mr. Doherty's deportation to Ireland not be executed prior to December 1, 1987, if it be executed at all.

25. On December 1, 1987, the Extradition (European Convention on the Suppression of Terrorism) Act came into operation in the Republic of Ireland. *See* Exhibit 3 for the text of the Act.

26. The provisions of the Act circumscribe the existing statutory law and decisional law so as to remove from the Irish courts the authority to decide whether a given offense is a political offense or an offense connected with a political offense.

27. It is intended that under the provisions of the Act the political offense exception will no longer operate in a case such as Mr. Doherty's to bar extradition from the Republic of Ireland to other countries.

28. To deport Mr. Doherty to Ireland subsequent to December 1, 1987, the effective date of the Extradition Act of 1986, is tantamount to deporting him to the United Kingdom. By virtue of the order of deportation entered September 19, 1986, Mr. Doherty could be deported to the United Kingdom only "if Eire advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory." Oral Decision of September 19, 1986, at 4.

29. Such is not the case. Ireland is bound to accept Irish citizens into Ireland upon deportation, subject to being satisfied as to the person's identity and Irish citizenship.

30. There is not now nor has there ever been any question of Ireland's willingness to accept Mr. Doherty into the national territory, and both the Service and the immigration judge have been aware of this fact for in excess of a year.

31. Had Mr. Doherty arrived in Ireland prior to December 1, 1987, any request by the British government for his extradition to the United Kingdom would necessarily have been considered pursuant to the statutory arrangements and decisional law which preexisted the Extradition Act of 1986. Under those laws, Mr. Doherty would have been able to resist extradition based upon the same political offense exception which precluded the British government from obtaining his extradition from the United States.

32. The INS has consumed nearly 15 months in appealing the order directing that Mr. Doherty be deported to Ireland in order to insure that at such time as he is deported to Ireland his subsequent extradition to the United Kingdom will, under the terms of the Extradition Act, be a mere formality and a foregoing conclusion.

33. Through this delay, the INS has subverted the integrity of the order directing that Mr. Doherty be deported to Ireland, as opposed to the United Kingdom, this determination of the country of deportation being one that the immigration judge is specifically empowered to make. 8 C.F.R. 242.8(a).

34. That the INS has engaged in dilatory conduct has been the subject of express comment both by the immigration judge and by this Board.

35. The immigration judge stated in his oral decision that "the Service has tried to delay a decision by me." Oral decision at 3.

36. More than six months ago, the Service's conduct had already moved this Board to state that "the glacial pace at which any tangible proof of this (country's) interest was produced seems to belie any sense of urgency or responsibility on the part of the government to proceed promptly in this case." Decision of May 22, 1987, at 5. The Board's statement was prompted by the fact that despite the Service's repeated representations that the case was unique, and of interest at the highest levels of government, and subject to personal consideration by the Attorney General supposedly as far back as September 1986, the Service allowed almost six months to elapse before it produced the affidavit it had promised to the immigration judge in September 1986.

37. The Service has never offered any explanation of why it tried to delay the entry of decision by the immigration judge, nor of why it failed to produce for almost six months the affidavit which ostensibly constitutes evidence of prejudice. Nor did the Office of Legal Counsel offer any explanation of why it took an additional five full months simply to notify the respondent that the Attorney General had accepted the case for review.

38. Significantly, the Service has admitted that its intent is to accomplish a de facto extradition.

39. In October 1987, CBS Sixty Minutes aired a segment devoted to Mr. Doherty's situation. Counsel for the Service stated on the program:

> It's quite clear that in the extradition proceeding the objective was to get Doherty back to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that.

See CBS Sixty Minutes transcript at 10, appended hereto as Exhibit 4.

40. The delay has not solely been occasioned by the Service, however, but has also emanated from the Department of Justice itself. After referral of the matter to

the Attorney General for review, the Attorney General did nothing for five full months, at the end of which time a perfunctory letter was sent to respondent's counsel, advising her that the matter had been accepted for review and that any brief on respondent's behalf was to be submitted on or before December 1, 1987, the same day the Extradition Act went into effect. *See* paragraph 21 above. The leisurely pace at which the government has seen fit to proceed is inconsistent with the concern which should be occasioned by respondent's shockingly long period of detention. *See Paulis v. Sava*, 544 F. Supp. 819, 821 (S.D. N.Y. 1982).

41. The preoccupation of the Service—and seemingly the Attorney General as well—with Mr. Doherty's punishment does not justify engaging in delay calculated to deprive the respondent of his substantive right to designate the country of deportation and which vitiates the authority of the immigration judge to determine the country to which a potential deportee will go.

42. Under our system of laws punishment for ostensible criminal acts is the province of a requesting government, and may be meted out by it when an individual is returned to its jurisdiction by the Secretary of State in conformity with the procedures governing internation extradition and set out in 18 U.S.C. 3181 et seq.

43. Mr. Doherty cannot be extradited from the United States to the United Kingdom because the acts for which his extradition was sought were not common crimes but rather classic political offenses.

44. Under these circumstances, the Service's only valid concern is expelling respondent from this country, not seeing that he is deported specifically and only to the country which has been denied his extradition. *McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986).

45. The legitimate office of the INS is to enforce the Immigration and Nationality Act, not the extradition laws of this or any other country. *See United States ex rel. Martinez-Angosto v. Mason*, 344 F.2d 673 (2d Cir.

673 (2d Cir. 1965); A. Helton, "Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony," 1 Geo. Imm. L. J. 457, 479 and nn. 152-156 (1986); M. Roberts, "The Grounds of Deportation, Statute of Limitations on Deportation, and Clarification of the Nature of Deportation," 57 Interpreter Releases 57 (March 31, 1980).

46. The government's conduct of the instant case is calculated to circumvent both the letter and the spirit of the order of deportation directing that Mr. Doherty be returned to Ireland.

47. The government's conduct works severe and substantial prejudice on Mr. Doherty as it insures his return to the United Kingdom, a place where he has a well-founded fear of persecution, and, further, it subjects him to treatment wholly aberrant from that afforded every other deportee, including those in positions identical to Mr. Doherty's.

48. Under these circumstances, respondent is entitled to the relief he seeks in his motion to reopen or to reconsider.

/s/ Mary Borezs Pike
MARY BORESZ PIKE

SUBSCRIBED and SWORN TO before me this 2d day of December, 1987.

/s/ Lynn R. Stockhamer
Notary Public

EXHIBIT 1

SOMERSTEIN & PIKE
Attorneys at Law
401 Broadway
27th Floor
New York, New York 10013

(212) 925-3232

June 4, 1987

Edwin Meese III
Attorney General of the United States
United States Department of Justice
Room 5111
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: In the Matter of Joseph Patrick Thomas Doherty,
A26 185 231 (NYC)

Dear Mr. Meese:

We have learned that the above-referenced matter has been referred to you pursuant to 8 C.F.R. 3.1(h)(iii).

While the BIA chairman's memorandum to you of May 29, 1987, does state the "the alien is detained," the circumstances of his detention merit further reference. Mr. Doherty is detained and has been so since June 18, 1983. His fifth year of detention will soon begin

We trust you will cause us to be advised of the procedures which will govern your review of the Board's decision.

Very truly yours,

MARY BORESZ PIKE

MBP/1
cc.: J. Scott Blackman, Assistant District Director
Deportation

EXHIBIT 2

U.S. DEPARTMENT OF JUSTICE
Office of Legal Counsel

Office of the
Assistant Attorney General

REGISTERED/RETURN
RECEIPT REQUESTED

Washington, D.C. 20530
Oct. 28, 1987

Re: Review of Board of Immigration Appeals' Decision: In re Doherty, No. A26-185-231

Mary Boresz Pike, Esq.
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

Dear Ms. Pike:

This is to inform you, as counsel of record for Joseph Patrick Thomas Doherty in the above-captioned proceeding, that the Attorney General has granted the request of the Immigration and Naturalization Service (INS), made pursuant to 8 C.F.R. 3.1(h)(1)(iii), that he review the decision of the Board of Immigration Appeals (BIA) involving the deportation of Mr. Doherty. The Attorney General has granted the INS's request so that he may review the BIA's affirmance of the decision of the immigration judge that there was no clear evidence to support the conclusion of the INS that the deportation of Mr. Doherty to the Republic of Ireland would be prejudicial to the interest of the United States and that, instead, he should be deported to the United Kingdom. 8 U.S.C.

1253(a). In his review, the Attorney General will determine whether it is prejudicial to the interest of the United States for Mr. Doherty to be deported to the Republic of Ireland, and whether he should be deported to the United Kingdom. No other issues will be considered by the Attorney General.

The determination under 8 U.S.C. 1253(a) as to whether deportation of an individual to the country he designates would be prejudicial to the interests of the United States and the alternative country to which he should be deported is wholly within the discretion of the Attorney General. Thus, Mr. Doherty has no statutory or constitutional right to present evidence or otherwise have a hearing before the Attorney General. However, in his discretion, the Attorney General has decided that it would be appropriate in this case to give Mr. Doherty the opportunity to present his views in writing.

Accordingly, if he wishes, Mr. Doherty may submit a memorandum addressing the question under review. Associate Attorney General Stephen Trott has prepared an affidavit (attached to which is an earlier affidavit of Terrell Arnold of the Department of State) setting forth the basis for his conclusion that it would be prejudicial to the interest of the United States to deport Mr. Doherty to the Republic of Ireland, and that he should be deported to the United Kingdom. Since the Attorney General will consider Mr. Trott's affidavit in the course of his review of the BIA's decision, Mr. Doherty may wish to respond to the facts and reasoning contained therein in any memorandum he submits to the Attorney General. A copy of Mr. Trott's affidavit is enclosed.

Any memorandum Mr. Doherty submits to the Attorney General should not exceed thirty typewritten pages, double-space on 8½" by 11" paper. The memorandum should be submitted to the Attorney General, and a copy sent to me, on or before December 1. The Attorney General would consider a request to exceed these page limits or

extend the time for filing, but would grant such a request only if he determined it was based on compelling reasons.

If you have any questions concerning this matter, you may contact Bruce Lindsay at 633-3694.

Sincerely,

/s/ Charles J. Cooper
CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Enclosure

EXHIBIT 4

TRANSCRIPT—60 MINUTES
(October 10, 1987)

14. REASONER Is Joe Doherty an Irish soldier who killed in the line of duty? Or an Irish terrorist who murdered in cold blood? The Justice Department says he's a terrorist who should be returned to the British jail in Northern Ireland from which he escaped. Five federal judges say he is not a terrorist; he's a soldier, and refused to order his extradition. Meanwhile, Joe Doherty continues to sit in an American jail, where he's been for four years, four months, waiting. If it were up to him, he says, he'd like to be deported to the Republic of Ireland, the independent part of that country, where the British can't get their hands on him.

During his four years, four months in New York's federal jailhouse, he has never been formally charged with anything but illegal entry to the U.S. How much longer will he have to sit there?

15. JOE DOHERTY OF THE IRA VTR

TRANSCRIPT

"JOE DOHERTY OF THE IRA"

DOHERTY: At a very young age. I made a commitment to myself that I would sacrifice my life and my years to bring about freedom in Ireland.

REASONER: Freedom for the Joe Doherty's of this world means the violent expulsion of British troops and reunification of Northern Ireland with the Independent Irish Republic. Joe went to war when he was 15. He joined the provisional Irish Republican Army—then the most ferocious segment of the anti-English Movement. He saw some action, but mostly the inside of British jails. Then, he got in on an important operation.

DOHERTY: I was involved in an incident where a British army soldier was killed.

REASONER: Antrim Road in Belfast in 1980 was frequently used by British military convoys. That year, Joe Doherty and three others armed with an American made heavy machine gun and other weapons set up an ambush from the two upper floors of Number 373. They were waiting for a convoy they believed due. After three hours, nothing had happened. But when they dismantled the ambush, a five man British army patrol in civilian clothes and obviously informed charged up and opened fire. Captain Herbert Richard Westmacott led his men up to the front door. He was killed by a burst of fire from a machine gun.

DOHERTY: He had a machine gun and a nine millimeter pistol. And the American government and the British government have . . . have . . . blew up that this is a horrific crime.

REASONER: Captain Westmacott was one of thousands of British soldiers, detached professionals, as opposed to the IRA's passionate amateurs who have died in Northern Ireland. He was a graduate of Britain's West Point, Sandhurst, father of a seven month old daughter

when he died. He got the military cross posthumously for leading his men up to that door on Antrim Road. The men inside, Joe Doherty included, were captured and tried in Belfast under emergency regulations before a judge without a jury. Doherty offered no defense. He refused to recognize the court's jurisdiction over what to him was a battle casualty.

Here at the Crumlin Road Jail in June of 1981 Joe Doherty and seven other IRA provisionals ambushed three guards dressed in their uniforms, and successfully bluffed their way out past three interior checkpoints. They came out through the main gate where there were other provisionals waiting. Security guards across the street at the courthouse opened fire. There was a lot of shooting, but all eight got away. The IRA calls it "The Great Escape". Two days later, with Doherty absent, the court convicted him of murder and other crimes. The sentence was life imprisonment.

DOHERTY: The escape itself was such a prestigious event that Margaret Thatcher swore that she'd get the escapees back because this was a maximum security prison. So there was thousands of troops sent in to search for us and the IRA were in fear that I would be maybe singled out to be assassinated by British Intelligence. And so the IRA made a decision that they would send Joe Doherty, alias, Henry O'Reilly to the city of New York, and here I came.

REASONER: Were you told to be on your good behavior?

DOHERTY: Oh, yeah, yeah. Well, the IRA told me back in Ireland, just go over there and be normal, go watch some baseball . . . just be a part of the scenery, you know. And this is what I did . . . I had a job. I worked.

REASONER: Dohery and a young woman he had met lived in Brooklyn for awhile, and then moved to an Irish neighborhood in Kearney, New Jersey. His job as a brick

layer ran out and he picked up part-time work at Clancey's Bar on New York's east side.

DOHERTY: It was a Saturday morning. It was the 18th of June 1986. I had just opened the bar at eight o'clock in the morning. I knew it was around nine o'clock when I seen a bunch of construction guys come in. So I set up the beers. And I found out that they weren't construction guys. They were the FBI. And they pulled out their identifications and their guns, and they told me that I was under arrest.

REASONER: That was June 1983.

DOHERTY: Yeah.

REASONER: You've been in jail ever since.

DOHERTY: Yeah. Sadly to say.

REASONER: With Joe in custody, the British promptly asked the United States to send him back to Northern Ireland, but a Federal Judge looked at the treaty governing extradition between the United States and the United Kingdom and said that Joe's crime, the death of Captain Westmacott, fell into the section covering political, not criminal acts. Another Judge and the Circuit Court of Appeals agreed.

How do you justify the car bombs and the ambushes and the bloodshed in general?

DOHERTY: Well, how can you justify the ambushes of the redcoats over 200 years ago. The IRA have strict orders that civilians do not be killed. I have seen this order from the IRA. But at time to time we have made terrible mistakes. We have tried to rectify that.

LADY KNIGHT: If a man says, well, I know I did murder, yes, I did kill, I did maim, but I only did it, sir, because I have political convictions. That gives the green light to terrorists all over the world.

REASONER: Lady Jill Knight, a conservative member of Parliament, reflects the anger about Doherty felt by Mrs. Thatcher.

LADY KNIGHT: I just wonder what the attitude of some of the Americans who support the IRA would feel

about an Arab killer who escaped extradition because he claimed political reasons for his activities.

REASONER: We put that question to Connecticut's Democratic Senator, Christopher Dodd. The Germans, for instance, have arrested an Arab who was presumably in on the TWA Beirut hijacking, and the brutal murder of and American sailor. Is that an act of violence for which he should escape extradition?

SEN. DODD: Not at all. Judge Sprizzo who handled the Doherty case I think set out three criteria which are pretty good ones. He said that one, it ought to be a long standing conflict. That you ought to be a part, you have to be a part of an organized military, a paramilitary group, and your target has to be a military target. In the case you've just identified, of course, the TWA Airline or a disco is hardly a military target. So they would not qualify under the Sprizzo criteria.

REASONER: Lady Jill says there is no criteria for killing.

LADY KNIGHT: If a court in the man's country of origin had said, listen to the evidence, had come out with the clear verdict that the man was guilty, then, of course, we would allow extradition because if you don't allow extradition you perpetuate terrorism. And this is one of the major problems on the International scene.

REASONER: The Joe Dohertys of the IRA grew up in streets like these. It's not that the neighborhoods are so awful, but they're unrelieved any joyless. And everything, the games, the old rebel songs, the endless talk of the unemployed dads combine to ready the youngsters for violence and heroics and martyrdom.

The kids in Belfast Catholic ghettos turn to heroics and martyrdom as a way out.

Joe's mother, Maureen Doherty, lives in this typical row house in this typically Catholic neighborhood. Her husband, Joe's father, has been unemployed for six years, also typical.

Is all that worth it? I mean, you've had your son in jail most of his adult life since he's been 15, 16, right?

MAUREEN DOHERTY: Joe has spent most of his teenage years in prison, and his 20s he spent in prison. Now he's 32 years of age, and it doesn't look likely that he'll be out for even his 40s. And I feel very sad that I know he'll never walk the streets here again, no.

REASONER: Prime Minister Thatcher says about your son, murder is murder is murder. What do you say to that

MAUREEN DOHERTY: Well, there's a . . . well, in all wars, murder is murder is murder.

REASONER: It's a war to you.

WOMAN: It's a war. It is. And in all wars, it's murder.

REASONER: End of story? No. Doherty has come up with his own solution. If the Justice Department wants to send me back, he says, okay, send me back, deport me to Independent Southern Ireland, not Northern Ireland. Suddenly, the Justice Department is on the other side. If you're going anywhere, they say, it's back to that jail in British Northern Ireland.

DOHERTY: A few months ago. I conceded and asked to be deported back to Ireland, the South of Ireland, where the British are not in control, and, and surprisingly the State Department said, no, I cannot go. Now I have to stay.

REASONER: They'd like to deport you to the United Kingdom.

DOHERTY: Yeah, they would like to deport me to the British.

REASONER: Jay Scott Blackman is the Immigration Service Attorney who has been involved in the Doherty case from the beginning.

Immigration Judge Harold Cohen ordered Doherty deported to the Republic of Ireland where he faces a ten year prison sentence, and could be extradited to Belfast. Why don't you like that?

MR. BLACKMAN: Because it's the policy of the United States government that persons who commit terrorist offenses should not be permitted to escape the consequences of their acts through international flight. That's just not the way it should be.

REASONER: Doherty's lawyers argue it is out of place for the U.S. government having lost every battle over extradition to try to accomplish the same thing disguised as a battle over simple deportation—a tactic, they say, the government has never used before. The government freely admits its aim is to give Doherty back to the British one way or another.

MR. BLACKMAN: Our position certainly is that this is permissible under the law. It's quite clear that in the extradition proceeding the objective was to get Doherty to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that.

DOHERTY: I symbolize what's happening in Northern Ireland. The British government have been saying to the American people for the past 15 years that the IRA are terrorists. They're nothing but a bunch of criminals and thugs. And when I came to the United States I was arrested. I came before Federal Courts where Federal Judge made a decision that there is a political war going on in the North of Ireland. And the British blew up over this. They went crazy about it. And they started saying that this judge was bought off and they started saying that these judges don't know nothing.

REASONER: Since we completed that report, still another judicial body—the three-judge Board of Immigration appeals, has also ruled against the government, insisting that Joe NOT be turned over to the British, but be sent to Republic of Ireland. The Matter is now on the desk of Attorney General Edwin Meese. Meanwhile, Joe Doherty's address remains: Metropolitan Correctional Center, New York.

AFFIDAVIT OF MARY (MAUREEN) DOHERTY AND EXHIBIT 1 THERETO
(dated December 2, 1987)
(filed with Motion of Respondent to Reopen or Reconsider)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

File No. A26 185 231 (NYC)

IN THE MATTER OF JOSEPH PATRICK DOHERTY,
RESPONDENT

AFFIDAVIT OF MARY (MAUREEN) DOHERTY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARY (MAUREEN) DOHERTY, being duly sworn, hereby deposes and says that:

1. My name is Mary Doherty. I have always been called Maureen, however, and that is the name I am known by.

2. I am a citizen of Ireland.

3. I live at 136 Upper Meadow Street, in Belfast, Northern Ireland. I live at that address with my husband Joseph and my youngest daughter, Patricia, 23.

4. In addition to Patricia, my husband and I have four other children, three daughters and one son.

5. Our daughters are Anne, 31, Maureen, 28, and Sharon, 26.

6. Our son Joseph is 32 years old. For the past four and a half years, Joseph has been imprisoned in America while the British government sought unsuccessfully to have him extradited.

7. It has been explained to me that the U.S. Immigration and Naturalization Service seeks to have Joseph deported to the United Kingdom.

8. Joseph and I fear that if he is returned to the United Kingdom he will be subject to persecution on account of our religion, which is Roman Catholic, and on the basis of his political opinions, which are nationalist or republican. He has from a very young age held the firm belief that the six counties of northeastern Ireland should not be under British rule.

9. People who hold this belief are known as either nationalists or republicans.

10. We live in north Belfast, in a small housing estate or district. It is known as New Lodge or the New Lodge. It is a neighborhood in which most of the residents are Catholic, and it is known as an area with strong nationalist/republican sympathies.

11. As with the other nationalist/republican districts in north Belfast, the New Lodge is surrounded by loyalist areas. Loyalists are those who oppose the reunification of the six counties which presently constitute Northern Ireland with the 26 counties of Ireland. Loyalists, the military, and the police perceive the New Lodge's residents, correctly, as being strongly nationalist or republican, and we have over the years been the subject of sectarian attacks.

12. Other north Belfast neighborhoods situated similarly to the New Lodge are Ardoyne, Newington, Bawnmore, Glandore, Ligoniel, Lower Cavehill, and Oldpark.

13. Both in the New Lodge and in the other nationalist/republican districts named above, the British Army and the RUC or Royal Ulster Constabulary, which is com-

posed almost entirely of Protestants, are a constant presence. The homes of nationalists are entered and searched at all hours of the day and night, police and army foot and motor patrols regularly stop neighborhood residents for questioning, and although people are frequently taken in for periods ranging from a few hours to seven days, they are usually released without charge after being interrogated as to their activities and political views and those of their family, friends, and neighbors.

14. Having lived in north Belfast all our lives, it is my family's experience that those who live in Catholic districts suffer both at the hands of the security forces, who by their conduct seem to equate residence in such a district with being a "terrorist," and at the hands of the loyalists, who regularly mete out violence to those whom they believe to be nationalists or republicans or simply Catholic.

15. Specific incidents which have occurred form the basis for the belief shared by my son and me that he will be subject to persecution if returned to the United Kingdom.

16. As far back as 1972, my family has been identified by the government as holding political beliefs of the nationalist or republican persuasion. This led to my two oldest children, Joseph and Anne, being interned by the British government. Internment was instituted by the British government in 1971. Joseph was interned when he turned 17. Anne also was interned at age 17, becoming the eighth woman selected by the British government for internment. Both children were held without charges and without trial, Joseph for a period of approximately six months, Anne for substantially longer. I have affixed to this affidavit the document given to Joseph at the time of his internment (Exhibit 1) and a newspaper cutting (Exhibit 2) regarding Anne's internment. Our daughters Maureen, Sharon, and Patricia were too young to be interned.

17. On November 20, 1974, the home in which we were then living on Hallidays Road in north Belfast was

bombed and completely destroyed. The Ulster Freedom Force, a loyalist paramilitary group, claimed responsibility for the bombing. At that time our house was being searched almost daily by British soldiers, who frequently made threatening remarks while carrying out the searches. Some five weeks prior to the bombing, a note written in red ink was put through the door. It said, "Your time is nearly up for living."

18. After the house was bombed in 1974, our neighborhood pub, known as the Starry Plough, was bombed in 1975, leaving one person dead. My childhood friend, Lavinia McGreevy, lost both legs in the explosion. The Ulster Volunteer Force, a loyalist paramilitary organization, claimed responsibility.

19. Throughout ethe years our family has continued to be the object of loyalist and security force attention.

20. In November 1983, Maureen was acquitted of the murder of a British soldier after trial in a special non-jury Diplock court. Such courts exist to try political offenders; common criminals are tried in the ordinary crown courts where they are entitled to a jury trial and other protections denied those tried in a Diplock court. Prior to trial Maureen had been held for 18 months without bail.

21. After her acquittal on the ground of lack of evidence and her subsequent reelase, soldiers would make threatening remarks to Maureen, and they continue to do so.

22. We have lived in our home on Upper Meadow Street since 1983. During that period our house has been entered and searched four times by the security forces. No arrests have ever been made. The house search which occurred in approximately June 1985 was typical. It was conducted by four RUC policemen and one RUC policewoman, who arrived early in the morning. They searched all the rooms in the house, lifted mattresses, searched all the wardrobes and drawers, removing clothing and other contents, took everything out of the storage room which

encloses the water tank, and inspected my grandson's toy chest. Before leaving, they went through Patricia's photo albums and personal letters.

23. In or around July 1985, my daughter Maureen and Anthony (Tony) Hughes, the man with whom she lives, were arrested under section 12 of the Prevention of Terrorism Act, which permits detention for a period of up to seven days. Maureen and Tony were in a taxi when they were arrested; they had been headed into the City Centre, where Tony intended to get a haircut. The police left Sean, Maureen's then 8-year-old son, alone in the back seat of the taxi. They took Maureen and Tony to Castlereagh RUC Interrogation Center. Both were held for seven days before each was released without charge. During the course of his interrogation, threats were made to Tony to the effect that unless he agreed to work for them as an informer, the police would set him up for shooting by the loyalists and that the SAS (Special Air Service) would be sent to "take him out" at the first opportunity. Maureen, who was pregnant at the time, was subjected to verbal abuse and physical threats. In addition, the interrogators mentioned her brother Joseph to her several times, saying that the SAS was still very interested in getting their hands on him. The SAS is a specially-trained, counter-insurgency unit of the British Army, members of which are known to operate in plain-clothes in Northern Ireland.

24. Maureen has since been detained twice by the RUC. Each time she was held for several days, interrogated, and released. Each time she was subjected to verbal abuse and physical threats. Each time the interrogators talked about her brother Joseph and what would be done to him upon his return.

25. On March 26, 1986. Tony was again arrested by the RUC. He was subsequently released. As usual, he was not charged.

26. A short time later Tony was again arrested by the RUC while in a local community centre. He was again

held for a period of days, interrogated, and subsequently released without charge. During this time, he was again threatened and told he was a marked man. Upon his release, Maureen and Tony, convinced that they and their children are in serious danger, either from the security forces or from the loyalists, took steps to fortify their home, including installing bullet-proof glass, drop bars, and gates.

27. On or around July 1, 1986, Maureen's and Tony's house was entered by the security forces in the early hours of the morning. The house was ransacked during the search. When the police left, they took with them the transcript of Joseph's testimony before the court in the extradition proceeding in America. They also took Tony. He was again held for a period of seven days, interrogated, and released without charge.

28. A short time later, Maureen, Tony, and the children were in their home, and the door was kicked in. British soldiers entered and conducted a house search. Nothing was taken. The manner in which the soldiers entered, however, suggested that they were aware of the positioning of the security devices previously installed.

29. Tony's next arrest occurred just before Christmas. He was taken from their home. He was held for a period of three days, interrogated, and released without charge.

31. In September 1987, Tony was arrested again while out with Aisling, his and Maureen's infant daughter. Tony and the infant were taken in, Tony and the infant were held for several hours, and eventually Tony was released without charge. While in the station, he was told that a man had been arrested for conspiracy to assassinate him.

32. Shortly thereafter radio and television news reports stated that a man by the name of Robert Spence had been accused of conspiracy to murder Tony. Spence was also charged with being a member of the Ulster Volunteer Force, a loyalist paramilitary organization. I

have affixed a newspaper account pertaining to the loyalist conspiracy to assassinate Tony. (Exhibit 3).

33. On or around November 23, 1987, a Monday, Tony was again arrested. He was taken from their home. He was held for a period of 48 hours, interrogated, and released without charge.

34. On or around the following Friday, the home of Sharon McCann, our second youngest daughter, was raided by the gardai or Irish police. Sharon moved some years from the New Lodge and lives with her husband and children in Tralee, Co. Kerry. Sharon was home alone with three of their four young children, her husband Adrian having just left for work and to drop their oldest child at school. The police conducted a search of the house. No one was arrested; no charges have been lodged.

35. Paul McAllister, the husband of my eldest daughter, Anne, was arrested approximately five weeks ago. His car was taken, and when he subsequently went to the authorities to report that fact, he was arrested, charged with withholding information, and detained for seven days. While detained, the police made abusive remarks to him about his brother-in-law, my son Joseph.

36. In addition to these specific incidents involving my family, random persecution of Catholics simply on the basis of our religion is common in North Belfast.

37. I have affixed to this affidavit as Exhibit 4 newspaper cuttings from local newspapers which report just some of these incidents of violence directed against north Belfast Catholics.

38. Belfast itself is not that large a city, having a population of only about 350,000, and the area known as north Belfast is quite small. In the space of less than two years, a very incomplete account of episodes of sectarian violence as against Catholics in the area would include:

(1) Leo Scullion of Ligoniel, North Belfast. Bound hand and foot and shot in the head. Killed. January 1986. I had met Mr. Scullion on one or another occasion although I did not know him well.

(2) Martin Quinn from Bawnmore, north Belfast. Shot at point blank range in his bed. Killed. January 1986.

(3) John O'Neill from Ligoniel, north Belfast. Beaten to death. March 1986.

(4) Artie and Vivian Osborne, north Belfast. Burnt out of their home. April 1986. The cutting describing their plight contains the following paragraphs on the New Lodge, the district in which we live:

Sinn Fein issued statements last month warning residents of the New Lodge estate in north Belfast to be on their guard.

"There is a very real danger that we are facing a situation far more dangerous than 1969 or 1974 and we should make preparations now," they said.

They called for people with medical knowledge to come forward to the advice centre and anyone with a van or lorry to make themselves known.

(5) Margaret and Gerry Caulfield from Kilcoole Gardens, Ballysillan, north Belfast. Mrs. Caulfield, a Protestant married to a Catholic, was shot and killed as she lay in bed. Mr. Caulfield, to whom she had been married for two weeks, was wounded. May 1986. Mr. Caulfield was known to us through his first wife, whose father worked on the docks with my husband.

(6) Colm McCallan of Ligoniel, north Belfast. Shot in the head outside his home. Killed. July 1986.

(7) Police in full riot gear fire plastic bullets to drive back mob trying to force their way into Catholic homes. Manor Street, Roe Street, north Belfast. July 1986. (Our own area, New Lodge, was badly hit around the same time by loyalists from the Tiger

Bay district. A lot of Catholics' homes were wrecked on Duncairn Gardens, also some brand new houses on Hillman Street, the next street to ours going towards Duncairn Gardens. Rioting went on through the night and for several nights after. My husband and I took turns sitting up throughout the night just in case some sort of missile were again to come through the window, as happened in 1974. Barricades were put up by neighborhood residents in an effort to protect us from attack.)

(8) Michael and Margaret Reeves, Roe Street, north Belfast. Abandoned their home after loyalists tried to force their way in in broad daylight. July 1986.

(9) Martin Duffy, Manor Street, north Belfast. Shot to death. July 1986.

(10) 18-year-old Catholic youth chased and slashed by a group of loyalists, north Belfast. August 1986.

(11) John Logan, New Lodge, north Belfast. Struck on the head with a pistol. August 1986. Mr. Logan's brother is known to me.

(12) Hugh Gault, Alliance Avenue, north Belfast. Shot in the neck and leg. August 1986. A few days earlier the home of Mr. and Mrs. Gault was petrol-bombed.

(13) Raymond Mooney of Ardoyne, north Belfast. Shot four times in the back. Killed. September 1986.

(14) Edward Campbell of Ardoyne, north Belfast. Found murdered. Ulster Freedom Fighters, a loyalist paramilitary organization, admitted responsibility. July 1987.

(15) Young man from the New Lodge, north Belfast, shot dead while driving. September 1987.

(16) Five Catholic youths shot from passing car on the Antrim Road, north Belfast. (The article notes

that when shot they were "close to the Catholic New Lodge area and the gunmen would have known that youths in the area would be Catholics. The stretch of road saw frequent sectarian attacks on Catholics during the '70s.") November 1987.

(17) Samuel Morrison of Ardoyne, north Belfast. Shot and seriously wounded when answered knock at door of his home. November 1987.

39. In addition to the above incidents, Lawrence Marley of Ardoyne, north Belfast, was shot dead on April 2, 1987, when shots were fired through the door of his home by the Ulster Volunteer Force, a loyalist paramilitary organization. Joseph knew Larry, as did Maureen and Tony, and on the night of the attack, Tony ran to the Marley house, a short distance away from Maureen's and Tony's, after hearing the shots. He arrived to find Larry dying.

40. An additional danger to those believed to be Irish republicans is that they die at the hands of British soldiers and RUC policemen with a degree of regularity that caused Amnesty International to complain that the British authorities' methods

> of investigating police conduct "have not produced sufficient evidence and clarification to eliminate the possibility that unlawful use of force has been used by the security forces to kill people deliberately."

See The New York Times, Sept. 30, 1986, p. A12, cols. 1-2 (Exhibit 5 hereto). Amnesty International's 1987 Report reiterates its concern not only in this regard but also as to the fairness of judicial procedures in the Diplock Courts and to allegations of ill-treatment of persons arrested under the emergency legislation enacted by the Westminster Parliament. The Amnesty International Report 1987 section on the United Kingdom is appended hereto as Exhibit 6. Joseph, Maureen, and Tony have, in each and every instance, been arrested pursuant to the emergency legislation.

41. Many suspected to be victims of the shoot-to-kill policy were, like Joseph and Tony, young men known to hold nationalist or republican political views.

42. Since his earliest teenaged years, Joseph has been known to hold such views. Since his earliest teenaged years, he has been subjected to regular arrests, threats, beatings, and detentions both by the RUC and by the British Army, culminating in his internment without charges and without trial at age 17.

43. As a result of the British government's lack of success in obtaining Joseph's extradition, his case has been the subject of considerable media attention in the United Kingdom. Were he to be returned to the United Kingdom at this time, there is every reason to believe, based on his specific history and that of his family and on the generally hazardous existence of north Belfast Catholics, that he would be subject to persecution on the basis of his religion and on the basis of his political beliefs.

44. The likelihood of such persecution would be enhanced were he to be returned pursuant to the newly effective Extradition Act, implemented in Ireland December 1, 1987.

45. Loyalists have long sought the extradition of Irish republicans and if Joseph Doherty is returned from Ireland to the United Kingdom in the wake of the implementation of the Act, the heightened atmosphere will insure his serious persecution by those who have sought his return unsuccessfully and for so long.

/s/ Mary Maureen Doherty
MARY (MAUREEN) DOHERTY

SUBSCRIBED and SWORN TO before me this 2d day of December, 1987.

/s/ Lynn R. Stockhamer
Notary Public

[redacted] INTERNMENT ORDER

WHEREAS it appears to me, on the recommendation of the Chief Constable of the Royal Ulster Constabulary, that for securing the preservation of the peace and the maintenance of order in Northern Ireland, it is expedient that

[redacted]

who is suspected of having acted or being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland, should be interned.

NOW I, THE RIGHT HONOURABLE BRIAN FAULKNER, Minister of Home Affairs for Northern Ireland, by virtue of the powers vested in me by the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, and the Regulations made thereunder and of all other powers me thereunto enabling, DO HEREBY ORDER the said

[redacted]

forthwith to be interned in

and to be subject to all the rule and restrictions applicable to persons there interned, and to be kept interned there until further order.

If the said [redacted]

desires to make any representations against this Order of Internment [redacted] of this Order is served on him, hand in a [redacted] to the official in charge where he [redacted] official shall forthwith forward such [redacted] the Advisory Committee specially appointed for the [redacted] 12 of the said Regulations, which is presided [redacted] hold high judicial office, or is a [redacted] practising barrister of at least [redacted] of such representations.

[redacted] 1972.

BRIAN FAULKNER

MINISTER OF HOME AFFAIRS
FOR NORTHERN IRELAND

BEST AVAILABLE COPY

**LETTER FROM MARY BORESZ PIKE,
COUNSEL FOR RESPONDENT,
TO DAVID L. MILHOLLAN,
CHAIRMAN, BOARD OF IMMIGRATION APPEALS
(dated December 3, 1987)**

SOMERSTEIN & PIKE
Attorneys at Law
401 Broadway
27th Floor
New York, New York 10013

(212) 925-3232

December 3, 1987

By Express Mail

David L. Milhollan, Chairman
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
5203 Leesburg Pike, Suite 1609
Falls Church, Virginia

Re: In the Matter of Joseph Patrick Thomas Doherty,
A26 185 231 (NYC)

Dear Mr. Milhollan:

Please find enclosed a copy of Respondent's Motion to Reopen or to Reconsider, accompanied by the supporting affidavits of Mary (Maureen) Doherty and myself and the exhibits to each affidavit. The original was today lodged with the appropriate Service officer here in New York as per 8 C.F.R. 3.8(b), the underlying proceedings having been conducted here. Mr. Blackman, counsel for the Service, was personally served with a copy of the motion as well.

Mr. Blackman subsequently telephoned my office this afternoon to confirm that the District Director will convey our motion to the Board. I have no doubt that this will be promptly done.

It is our position that Mr. Doherty's motion is properly before the Board for decision, as opposed to the Attorney General.

I have also enclosed a copy of the Extradition (European Convention on the Suppression of Terrorism) Act, 1987. It was received from Dublin only today, and upon receiving it, I have determined that the copy which was earlier obtained from the British Information Service and which appears as Exhibit 3 to my affidavit is not the current version of the Act. There are no significant differences between the two, however, and the sole differences of any stripe are that the Extradition Act, 1987 contains a Section (7) amending Section 4 of the Extradition Act, 1965 and, further, Section 13 of the 1987 Act states the actual operative date, i.e., December 1, 1987, while the Extradition Act, 1986 states the bypassed date of June 1, 1987 (Section 12).

I call these discrepancies to your attention in order to eliminate any cause for confusion in the record. To that end, I will of course also provide the Extradition Act, 1987 to Mr. Blackman. Exhibit 3 to my affidavit will therefore correctly be understood to be the Extradition (European Convention on the Suppression of Terrorism) Act, 1987, as opposed to the Extradition (European Convention on the Suppression of Terrorism) Act, 1986.

As you are aware, the record of the proceedings in this matter was conveyed to the Attorney General for review on May 29, 1987, under cover of a memorandum from you. Please be advised that I have until January 8, 1988, to file a brief with the Attorney General on behalf of Mr. Doherty. We of course will be doing so.

Thank you for your assistance in this matter.

Very truly yours,

/s/ Mary Boresz Pike
MARY BORESZ PIKE
Attorney for Respondent
Joseph Patrick Thomas Doherty

REPUBLIC OF IRELAND
EXTRADITION (EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM) ACT, 1987

Number 1 *of* 1987

EXTRADITION (EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM) ACT, 1987

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
2. Convention countries.
3. Certain offenses not to be regarded as political offences.
4. Certain other offences not to be regarded as political offences in certain circumstances.
5. Jurisdiction in respect to certain offences committed outside the State.
6. Proceedings by virtue of *section* 5.
7. Amendment of section 4 of Act of 1965.
8. Amendment of section 44 of Act of 1965.
9. Amendment of section 50 of Act of 1965.
10. Power to apply provisions of Act to non-convention countries.
11. Saving.
12. Short title, collective citation and construction.
13. Commencement.

ACTS REFERRED TO

Criminal Law (Jurisdiction) Act, 1976	1976, No. 14
Explosive Substances Act, 1883	1883, c. 3
Extradition Act, 1870	1870, c. 52
Extradition Act, 1873	1873, c. 60
Extradition Act, 1965	1965, c. 17

EXTRADITION (EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM) ACT, 1987

AN ACT TO GIVE EFFECT TO THE EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM, DONE AT STRASBOURG ON THE 27th DAY OF JANUARY, 1977, AND TO AMEND AND EXTEND THE EXTRADITION ACT, 1965. [21*st January*, 1987]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—(1) In this Act—

"the Act of 1965" means the Extradition Act, 1965;

"convention country" means a country other than the State for the time being standing designated in an order under *section 2;*

"the Minister" means the Minister for Justice;

"serious offence" means an offence which, if the act constituting the offence took place in the State, would be an offence for which a person aged 21 years or over, of full capacity and not previously convicted may be punished by imprisonment for a term of 5 years or by a more severe penalty.

(2) References in this Act to an act include references to an omission and references to the doing of an act include references to the making of an omission.

(3) (*a*) A reference in this Act to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended.

(*b*) A reference in this Act to a subsection, paragraph or subparagraph is a reference to the

subsection, paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended.

(4) This Act applies, except where otherwise provided, in relation to an offence whether committed or alleged to have been committed before or after the passing of this Act.

2.—(1) The Minister for Foreign Affairs may by order designate the countries which are parties to the European Convention on the Suppression of Terrorism, done at Strasbourg on the 27th day of January, 1977.

(2) The Minister for Foreign Affairs may by order amend or revoke an order under this section including an order under this subsection.

(3) An order under this section shall, as soon as may be after it is made, be laid before each House of the Oireachtas.

3.—(1) For the purposes mentioned in *subsection (2)*—

(*a*) no offence to which this section applies and of which a person is accused or has been convicted outside the State shall be regarded as a political offense or as an offence connected with a political offence, and

(*b*) no proceedings outside the State in respect of an offence to which this section applies shall be regarded as a criminal matter of a political character.

(2) The purposes referred to in *subsection (1)* are—

(*a*) the purposes of Part II of the Act of 1965 in relation to any request for the surrender of a person made after the commencement of this Act by any convention country in relation to which that Part applies;

(*b*) the purposes of Part III of the Act of 1965 in relation to any warrant for the arrest of a person issued after the commencement of this Act in a place in relation to which that Part applies;

(*c*) the purposes of section 24 of the Extradition Act, 1870, and section 5 of the Extradition Act, 1873, in relation to the obtaining of evidence in the State for use in criminal proceedings instituted in a convention country after the commencement of this Act.

(3) (*a*) This section applies to—

(i) an offence within the scope of the Convention for the suppression of Unlawful Seizure of Aircraft, done at The Hague on the 16th day of December, 1970.

(ii) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on the 23rd day of September, 1971.

(iii) a serious offence involving an attack against the life, physical integrity or liberty of an internationally protected person,

(iv) an offence involving kidnapping, the taking of a hostage or serious false imprisonment,

(v) an offence involving the use of an explosive or an automatic firearm, if such endangers persons, and

(vi) any offence of attempting to commit any of the foregoing offences.

(*b*) References in this subsection to an offence include references to participation as an accomplice of a person who commits the offence.

(4) For the purposes of *subsection (3)(a)*:

(*a*) in *subparagraph (iii)* thereof, "an internationally protected person" has the meaning assigned to it by *subsection (5)*,

(*b*) in *subparagraph (iv)* thereof—

"an offence involving", in relation to kidnapping, the taking of a hostage or serious false imprisonment, includes any offence committed in the course thereof or in conjunction therewith;

"serious false imprisonment" means any false imprisonment involving danger, or prolonged or substantial hardship or inconvenience, for the person detained,

(*c*) in *subparagraph (v)* thereof—

"automatic firearm" means a firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty;

"explosive" means any article manufactured for the purpose of producing a practical effect by explosion or intended by the person using it for that purpose;

"an offence involving", in relation to the use of an explosive or an automatic firearm, includes any offence committed by means of the explosive or firearm.

(5) (*a*) In this section "an international protected person" means, in relation to any such offence as

is mentioned in *subsection (3)(a)(iii)*, any of the following:—

(i) a person who at the time of the commission of the offence is a Head of State, a member of a body which performs the functions of Head of State under the constitution of a state, a head of government or a minister for foreign affairs and is outside the territory of the state in which he holds office,

(ii) a person who at the time of the commission of the offence is a representative or an official of a state or an official or agent of an international organization of an inter-governmental character, is entitled under international law to special protection from attack on his person, freedom or dignity and does not fall within *subparagraph (i)*,

(iii) a person who at the time of the commission of the offence is a member of the family of a person mentioned in *subparagraph (i)* or *(ii)* and—

(I) if the other person is mentioned in *subparagraph (i)*, is accompanying him, or

(H) if the other person is mentioned in *subparagraph (ii)*, is a member of his household.

(*b*) (i) If in any proceedings a question arises as to whether a person was at the relevant time an internationally protected person, a certificate signed by, or by a person authorized by, the Minister for Foreign Affairs and

stating any fact relating to the question shall be evidence of that fact.

(ii) A document purporting to be a certificate described in *subparagraph (i)* shall be deemed to be such a certificate, and to be signed by the person purporting to have signed it (and, in the case of such a document purporting to have been signed by a person authorized by the Minister for Foreign Affairs, to have been signed in accordance with the authorisation), unless the contrary is shown.

4.—(1)*(a)* For the purpose mentioned in *paragraphs (a)* and *(b)* of *section 3(2)*, an offence to which this section applies and of which a person is accused or has been convicted outside the State shall not be regarded as a political offence or as an offence connected with a political offence if the court or the Minister, as the case may be, having taken into due consideration any particularly serious aspects of the offence, including—

(i) that it created a collective danger to the life, physical integrity or liberty of persons,

(ii) that it affected persons foreign to the motives behind it, or

(iii) that cruel or vicious means were used in the commission of the offence,

is of opinion that the offence cannot properly be regarded as a political offence or as an offence connected with a political offence.

(*b*) For the purposes mentioned in *section 3(2)(c)*, proceedings outside the State in

respect of an offence to which this section applies shall not be regarded as a criminal matter of a political character.

(2) (*a*) This section applies to—

(i) any serious offence (other than an offence to which *section 3* applies) of which a person is accused or has been convicted outside the State—

(I) involving an act of violence against the life, physical integrity or liberty of a person, or

(II) involving an act against property if the act created a collective danger for persons,

and

(ii) any offence of attempting to commit any of the foregoing offences.

(*b*) References in this subsection to an offence include references to participation as an accomplice of a person who commits the offence.

5.—(1) If a person, whether an Irish citizen or not, does in a convention country an act which—

(*a*) if he had done it in the State, would have constituted an offence, and

(*b*) falls within the description of any of the offences referred to in *subparagraph (iii)*, *(iv)*, or *(v)* of *section 3(3)(a)*,

or attempts in a convention country to do any such act, he shall be guilty of the offence which the act or attempt would have constituted if he had done or made it in the State.

(2) If a person who is a national of a convention country but not an Irish citizen does outside the State and that convention country an act which—

(*a*) constitutes an offence under the law of that convention country,

(*b*) If he had been an Irish citizen, would have constituted the offence of murder or manslaughter or an offence under section 2 or 3 of the Explosive Substances Act, 1883 (as substituted by section 4 of the Criminal Law (Jurisdiction) Act, 1976), and

(*c*) falls within the description of any of the offences referred to in *subparagraph (iii)*, *(iv)* or *(v)* of *section 3(3)(a)*,

he shall be guilty of the offence which the act would have constituted if he had been an Irish citizen.

(3) (*a*) For the purposes of this section, any act done on board a ship, aircraft or hovercraft, when it is in or over the territory of a convention country, shall be treated as done in that country and any act done on board a ship, aircraft or hovercraft registered in a convention country shall be treated as done in that country and in the convention country (if any) in or over whose territory it is done.

(*b*) In *paragraph (a)* "territory" includes territorial seas.

(4) The provisions of the law of the State applied by virtue of this section to things done in any other country shall be read for the purposes of this Act with any necessary modifications.

(5) This section shall apply only to acts done after the commencement of this Act.

6.—(1) Proceedings for an offence which is an offence by virtue of *section 5* may be taken in any place in the

State and the offence may for all incidental purposes be treated as having been committed in that place.

(2) Where a person is charged with an offence referred to in *subsection (1)*, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.

(3) The Director of Public Prosecutions shall not take, or consent to the taking of, further proceedings such as are mentioned in *subsection (2)* in respect of an offence unless it appears to him that—

(a) a convention country in relation to which Part II of the Act of 1965 applies has made a request under that Part for the surrender of the person concerned for the purpose of trying him for an offence in respect of the act in question and the request has been finally refused (whether as the result of a decision of a court or otherwise), or

(b) a warrant has been issued by a judicial authority in a place in relation to which Part III of the Act of 1965 applies for the arrest of the person concerned for the purpose of trying him for an offence in respect of the act in question and it has been finally determined (whether as the result of a decision of a court or otherwise) that the warrant should not be endorsed for execution in the State under that Part or that the person concerned should not be delivered up in accordance with the warrant, or

(c) because of special circumstances (which may include the likelihood of a refusal such as is mentioned in *paragraph (a)* or of a determination such as is mentioned in *paragraph (b)*) it is expedient that proceedings should be taken against the person concerned for an offence under the law of the State in respect of the act in question.

(4) If a person would, but for this subsection, be required on conviction of an offence referred to in *subsection (1)* to be sentenced to death, he shall be sentenced to imprisonment for life.

(5) No proceedings shall be taken—

(a) under this section in respect of an act that constitutes an offence referred to in *subsection (1)* and also an offence under section 2 of the Criminal Law (Jurisdiction) Act, 1976, or

(b) under section 38 of the Act of 1965 in respect of an act that constitutes an offence by virtue of that section and also an offence referred to in *subsection (1)*.

7.—The following section is hereby substituted for section 4 of the Act of 1965:

4.—A draft of any order proposed to be made by the Government under this Act after the commencement of the *Extradition (European Convention on the Suppression of Terrorism) Act, 1987*, shall be laid before each House of the Oireachtas and the order shall not be made until a motion approving of the draft has been passed by each such House.".

8.—Section 44 of the Act of 1965 (which specifies circumstances in which a warrant issued in a place in relation to which Part III of that Act applies shall not be endorsed for execution in the State) is hereby amended by the substitution in subsection (2) for the words from the end of paragraph (*c*) to the end of the subsection of:

"or that there are substantial grounds for believing that—

(i) the person named or described in the warrant will, if removed from the State under this Part, be prosecuted or detained for a political offence or an offence connected with

a political offence or an offence under military law which is not an offence under ordinary criminal law, or

(ii) the warrant was in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of these reasons.".

9.—Section 50 of the Act of 1965 (which specifies circumstances in which a person arrested under Part III of that Act shall be released) is hereby amended by the insertion in subsection (2) after paragraph (*b*) of the following paragraph:

"(*bb*) there are substantial grounds for believing that the warrant was in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of these reasons, or".

10.—(1) The Government may by order direct that all or any of the provisions of this Act which would, apart from this section, apply only in relation to convention countries shall apply (subject to such exceptions, if any, as may be specified in the order) in relation to any country which is not a convention country and with which there is in force an extradition agreement (within the meaning of the Act of 1965) as they apply in relation to a convention country.

(2) The Government may by order amend or revoke an order under this section including an order under this subsection.

(3) A draft of any order proposed to be made under this section shall be laid before each House of the Oireachtas and the order shall not be made until a motion approving of the draft has been passed by each such House.

11.—Nothing in this Act shall prevent—

(*a*) an offence from being regarded as not being a political offence or as an offence connected with a political offence, or

(*b*) proceedings for an offence from being regarded as not being a criminal matter of a political character,

for the purposes mentioned in *subsection (2)* of *section 3* in circumstances or by reason of considerations other than those referred to in that section or *section 4*.

12.—(1) This Act may be cited as the Extradition (European Convention on the Suppression of Terrorism) Act, 1987.

(2) The Act of 1965 and this Act may be cited together as the Extradition Acts, 1965 and 1987.

(3) The Act of 1965 and this Act shall be construed together as one.

13.—(1) Subject to *subsections (2)* and *(3)*, this Act shall come into operation on the 1st day of December, 1987.

(2) If, after the passing of this Act but before the 1st day of December, 1987, a resolution is passed by each House of the Oireachtas declaring that this Act should come into operation on a specified day before that date, the Minister shall make an order appointing the day so specified as the day on which this Act shall come into operation and this Act shall come into operation accordingly.

(3) (*a*) If, after the passing of this Act but before the 1st day of December, 1987, a resolution is passed by each House of the Oireachtas declaring that this Act should not come into operation on the 1st day of December, 1987, this Act shall not come into operation on the 1st day of December, 1987.

(*b*) If——

(i) a resolution passed by each House of the Oireachtas under *paragraph (a)* declares that this Act should come into operation on a specified day, or

(ii) a resolution is passed by each House at any time after the passing of a resolution by each such House under *paragraph (a)* (being a resolution that does not contain such a declaration as is specified in *sub-paragraph (i)*) declaring that this Act should come into operation on a specified day,

the Minister shall make an order appointing the day so specified as the day on which this Act shall come into operation and this Act shall come into operation accordingly.

TRANSCRIPT OF HEARING
(April 2, 1984)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE JOSEPH PATRICK DOHERTY

April 2, 1984
10:50 a.m.

[TESTIMONY OF RESPONDENT]

[624] (Hearing resumed)

THE COURT: Is everybody here?

MR. SOMERSTEIN: Yes, your Honor.

THE COURT: You may proceed.

MS. PIKE: Good morning, Your Honor.

We call as our witness this morning the respondent, Joseph Patrick Doherty.

JOSEPH PATRICK DOHERTY,

called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. PIKE:

Good morning, Joe.

A. Good morning.

Q. Will you remember, please, to speak slowly and to keep your voice up.

[625] A. I will.

Q. Would you state your address, please?
A. Metropolitan Correctional Center, New York, New York.
Q. What's your date of birth?
A. The 20th of January, 1955.
Q. How old are you at present?
A. 29 years of age.
Q. Where were you born?
A. I was born in the City of Belfast.
Q. Of what country are you a citizen?
A. I am a citizen of Ireland.
Q. Have you ever been married?
A. No.
Q. Where did you live while growing up, Mr. Doherty?
A. I lived in the City of Belfast.
Q. With whom did you live?
A. With my parents.
Q. Do you have any brothers or sisters?
A. I have got no brothers, but I have four sisters who are all younger than myself.
Q. Where is your family now?
A. They are all back home, except for one sister who came over for the trial.
Q. Directing your attention to June of 1981, were [626] you living in Belfast at that time?
A. Yes, I was.
Q. On June 10 of 1981, Mr. Doherty, were you a member of any political movement?
A. Yes, I was a member of what's known as the republican movement.
Q. What is the republican movement, Mr. Doherty?
A. The republican movement is an embodiment of several movements or several organizations; namely, the Irish Republican Army, which is the armed force at present fighting the British. There is also the Sinn Fein Party, which is the political party, which compares our actions north and south of Ireland. Also is Na Fianna

Eireann, which is the republican scout movement and the Cumann na Mban, which is the women's organization.
Q. What are the goals of the republican movement?
A. Well, they are pretty basic. It is a declaration of intent of British withdrawal from occupied Ireland, the reunification of Ireland, amnesty for all political prisoners and the setting up of democratic elections in the 32 counties.
Q. To what branch of the republican movement did you belong?
A. I was a volunteer in the Irish Republican Army.
Q. How old were you when you joined the Irish [627] Republican Army?
A. I was 17 years of age. Just turned 17, as a matter of fact.
Q. What circumstances led you at the age of 17 to join the Irish Republican Army?
A. I was just released from the internment camps, and, of course, I was a republican. I believed that the only way forward to peace and stability in the country was for British evacuation of the country. I believed that the only way this could be brought about was by armed conflict, so at the age of 17, after seeing constitutional means, the civil rights movement, etc., that the only way forward for peace was through an armed conflict.
Q. At the time you joined the Irish Republican Army, what was your understanding about what the goals of the IRA were?
A. Well, they were the same goals as myself, as I already explained.
Q. During your years of service with the Irish Republican Army, how if at all did the goals of that organization change?
A. It hasn't changed at all. It is still basically the four demands.
Q. Between the years of 1972 and 1981, approximately how much time did you spend in prison?

[628] A. I spent eight years, give a day or two, of course. Eight years in prison.

Q. Generally speaking, what were your responsibilities as an IRA volunteer during the periods that you were not in prison?

A. Well, of course my responsibilities in the Irish Republican Army was to be a soldier, and the main part of the war engaged the British forces in combat or armed conflict, but of course at that present time the Irish Republican Army had a lot of responsibilities.

We had the responsibility of gathering intelligence, defense of the ghettos and countryside and whatnot, and also social work within the cities and the countryside.

Q. What did the intelligence gathering aspect of your responsibilities include?

A. This was to gather intelligence on the local British forces, her many battalions in the particular part of the city, which regiments as the British Army broke up into different regiments which differ from the United States Army. We have the Queens Regiment, the Commandoes, Paratroopers, Scotch Regiments, etc.

It's very a traditional part of the British Army, so we had to gather, of course, at a very young age, what a colonel was, major, the identification marks on tanks, [629] identification marks on different soldiers, the formation of soldiers, as in foot patrols, which came into the ghettos, because the British Army just don't walk in in five or six, they come in in a combat situation and in a certain formation.

So every volunteer had the responsibility to keep his eye open, to study the British forces or study your enemies.

Q. What was the defensive aspect of your responsibilities as a volunteer?

A. Well, we had an auxiliary unit in each ghetto which was based on a company, battalion and brigade level. This was purely defense, but the operational part of the Irish Republican Army, which I was in, also done

defense work as well. This was during the sectarian strike, when the sectarian assassination gangs were attacking the Catholic ghettos, bombings, shootings, so we were put on 24-hour standbys. This was sitting in houses with weapons waiting on attacks. This goes back to the twenties and whatnot.

Q. You mentioned earlier that you had been imprisoned for eight years, give or take a couple of months.

A. Yes.

Q. What prisons were you confined in during those periods of your imprisonment?

[630] A. I was in the Maidstone Prisonship, which was a prisonship situated in Belfast dock. Long Kesh Concentration Camp and Crumlin Road Prison.

Q. During these periods of imprisonment, Mr. Doherty, what effect did they have on your status as a volunteer in the Irish Republican Army?

A. It didn't change the status at all. As we recognize IRA volunteers in the prison, they are still combatants, they still carry on the war. They do not lose their status as an Irish Republican Army volunteer.

Q. I would like to direct your attention particularly to May 2, 1980. Were you on that date assigned to a particular unit of the Irish Republican Army?

A. Yes, I was.

Q. To what unit were you assigned?

A. I was sent to an active service unit of the Belfast Brigade.

Q. What is an active service unit?

A. An active service unit—now we are taking 1982, which is different from years ago where the Army came in to some sort of a change. The active service unit is only a section of the Irish Republican Army.

We have other sections. We have the defense section, which is called the administration, which is the main body of the Irish Republican Army. They deal with [631] social work, police work and defense of the district, and then the brigade is broken up into certain units, intelli-

gence units whose specific job is to gather intelligence. This is again watching troops, troop movements, homing in on British airways ways, the airways, trying to break British codes, etc.

We have an internal security, which is specific units which deal with courts martial, similar to the military in the United States Army and the British Army. We have the engineering units, which specifically deal with the economic war, and then lastly myself, the active service units. You could call us the infantry.

Q. In your capacity as a volunteer assigned to an active service unit, did you have occasion to be engaged in an operation on May 2 of 1980?

A. Yes, I was.

Q. What was the nature of this particular operation?

A. It was to engage and attack a British military convoy.

Q. What are the purposes of an operation of this type?

A. Well, there is a two-fold, really. One is military and the other one, of course, is political.

Q. Let me separate them so we remain clear. What are the military objectives that the Irish Republican Army [632] seeks to accomplish through an operation of this type?

A. Well, being a soldier myself of ten, twelve years, I have had plenty of experience to come up against the British Armed Forces, so you could say I am pretty experienced on what the British Army role is.

The British Army role in the north of Ireland, as I see it, is a combat role. What I mean by this, they don't come into the ghettos and the countryside in one or two-man foot patrols. They come in in a military formation. This formation, as typical, they have a nerve center or center patrol of an eightman foot patrol. These eightman foot patrols have usually flanks and a rear guard with another flank.

There is usually an armored car backup. This is with the APCs. That is armored personnel carriers. They also have flight control, which is troop helicopters, which usually fly around the place to give them support.

So the purpose of an operation like this is to break up this formation or to spread it out more. It is a part of the guerrilla war tactic.

So this type of ambush, along with mortar attacks on British military bases, rockets and bazooka attacks on their tanks, firing on their helicopters, etc., it is sort of to spread the military more, and this is just one of these parts of the operation, and of course to [633] inflict as many casualties as possible. This brings harm to British troop morale in the combat zone.

Q. You mentioned also that there were political objectives that the IRA sought to accomplish of this type. What are those political objectives?

A. Of course, but by us inflicting as many casualties as possible, it will bring great harm to British troop morale. This, of course, starts a chain reaction back to the British government and back to the British population as a whole, as reports, government reports and reports on the television and whatnot indicate that the recruitment in the British Armed Forces is somewhat dropped in the last ten, twelve years, of course due to the situation in the north of Ireland with the war on.

Similarly, most of all these young lads from Birmingham, London and Glasgow, they feel the war in the north of Ireland is not justified and they shouldn't be there, or on the other hand they don't want to go into a war situation which they don't understand. They don't understand the conflict of the period, false patriotism or duty to their country, and when most all those young lads joined the British Army they usually want to go to Germany on standby and they usually want a guarantee that they won't be sent to the north of Ireland, which of course I can't blame them, you know.

[634] So—and also when you take—there was a census taken on the general population regarding the north of Ireland, and the general population, a majority of the vote says that they want the troops home. They want some sort of solution in Ireland which the Irish can deal with themselves, and this puts a lot of pressure on the British government.

So if you take a small operation like this, just ambushing troops and so much of a chain reaction, especially when soldiers come back and give the story to their people about combat duty, their friends are maybe injured or killed, so it is sort of a chain reaction going to the government, and the Document 37 report by General Clover, he stated there himself that he couldn't beat the IRA on their ground. He stated for the next five years we cannot beat the IRA.

Well, I can maybe talk personally and maybe talk on behalf of the Irish Republic Army that we can not actually beat the British Army on the grounds, if it is too large an army, the most modern, most disciplined, the best equipped army in the world, so we can't exactly push the British out to sea, so we have to revert to guerrilla tactics because we are a small army, we are a very small country, we haven't much terrain to work with, so we have to revert to urban guerrilla war in the cities and [635] guerrilla war on the border.

So it's an ambush or mortar attack puts a lot of pressure on the Army which sends a chain reaction to the British government to bring about a negotiation and a final solution to the problems in the north of Ireland.

[636] Q. What was your general purpose in participating in this mission on May 2, 1980?

A. To further the war effort, of course.

Q. Where was this operation to take place, Mr. Doherty?

A. It was to take place in the north of Belfast on the Antrim Road, which is one of the main arteries in

the city. It was to take place exactly on the Antrim Road, the [redacted]junction of Cavehill Road.

Q. This is in the City of Belfast?

A. Oh, yes, of course, right.

Q. Why had that particular location been selected?

A. Well, the Antrim Road which is in North Belfast, ongoing northwards on the Antrim Road about I'd say half a mile we have Dunmore Barracks. This is a very large army installation. I am not too sure whether it is a battalion or maybe two battalions of troops.

Going southwards on the road we have another army camp which is called Girdwood Barracks. Girdwood Barracks, this is again I think up to one battalion of British troops.

So, of course, when you have two very large camps, you have communications vehicles, you have army patrols, food trucks, you have constant army convoys going between the two barracks.

[637] Q. Were other volunteers participating on this operation with you?

A. Yes, there was.

Q. Where were you and the other volunteers who were participating on the operation to be located relative to the injunction that you first finished describing?

A. Well, again, as I explained before, through the intelligence operations we found that there was traffic lights at the junction of the Cavehill Road and the Antrim Road, so the best place for attack was to take a house on the righthand side at the junction going north.

Q. How did you happen to pick the particular house that you came to be located in?

A. Again, I wasn't personally involved. We just got communications from the intelligence unit that there was a three-bedroom—a three-apartment building, and the report we got was that the second and third floor was vacant, and the bottom floor, the first floor, had tenants living there.

Q. What did you and the other volunteers do upon arriving at 371 Antrim Road?

A. Well, there was two volunteers sent 'round to the house. The two volunteers approached the house and there was a lady came to the door.

The volunteers expressed to the lady that they [638] were members of the Irish Republican Army and they wished to take the house over. They guaranteed the lady that they—that she was not the purpose of the operation, that we needed to get to the second and third floor.

She seemed a bit nervous, of course, but we gave her a guarantee that no harm would come to her.

So the other volunteer told them to go back into their own apartments and out of harm's way, told them to sit and relax, and there was a volunteer left to sort of keep an eye on them to make sure they don't stray about the house, and whatnot.

Myself and two other volunteers went to the second floor and secured the second floor. We checked the second and third floor and there was no persons at all in the house.

Q. What did you do at that point, Mr. Doherty?

A. Well, of course, we went about to get our weapons ready and get sort of a briefing from the operations officer, who was Volunteer Robert Campbell. He was one of the men on the scene. He was the operations officer. He was the commanding officer, you could say.

We went about to get the weapons ready and to wait on the targets.

Q. After you took up your position and began to wait on the targets, what happened?

[639] A. Well, after I think about three or four hours, maybe, something very strange happened. We noticed that there was no British convoys coming down the road. It was very, very strange that there was no convoys coming down.

So the officer in command, Campbell, reckoned that there was something strange and we could be set up, or something. So he says, well, maybe we should pull out.

And just about as we were to pull out, within that 15 minutes, this is when the shooting started.

Q. What happened to start the shooting right before you had decided to pull out?

A. Well, all the volunteers on the scene—there was three volunteers up the stairs, there was myself, Volunteer Robert Campbell, and Volunteer Angelo Fusco. The volunteer down the stairs was Volunteer Paul McGee.

Volunteer Fusco noticed that the traffic had seemed to slow down or come to a stop, while I noticed straight away that, this being a very busy road, there was something up.

So the next thing was a car approached the house. I didn't exactly see where the car came from, but when I looked out, I seen the car just pull to a stop on the outside of the house. As we were on the second floor, we were looking down, the car stopped. When the car stopped, it came to a very sudden stop and five men got out of the [640] car.

Q. When these five men got out of the car, what if anything did you observe about them?

A. The five men were dressed in civilian clothing. They were carrying machine guns. We thought they were Uzi machine guns, which is an Israeli assault weapon. It is very easy to conceal, and whatnot. One of them was carrying a sledge hammer in his hand and they were all wearing orange arm bands around their arms.

Q. When these five men got out of the car, what did they do?

A. Well, when they got out of the car they were in the position where they were attacking the house where we were in. They were in this position here coming towards the house. There was a number of shots fired and, of course, in that split second we fired back.

Q. In those split seconds after the arrival of these five men on the scene, what if any conclusions did you draw as to the identity of these men?

A. Well, we knew straight away that they were members of the Special Services or members of the MRF, which is the Military Reaction Force. This is units of the British armed forces.

Q. What did you base this conclusion on?

A. Well, the type of assault, and this is not the [641] procedure of the regular army because the regular—they were out of uniform, they were in civilian dress. The arm band was very, very important.

THE COURT: Why was the arm band important?

THE WITNESS: Because through our intelligence we found that the SAS operate and when they operate they wear an orange arm band. This is to identify themselves with the regular troops. In case the regular troops come on the scene and seeing all these civilians running about, the ones with the orange arm bands are friends. If you haven't got an orange arm band on, naturally you would be the other side. This was to identify themselves because, of course, in a gun battle things move so fast, especially the color—as you know, people who go out at night on bicycles wear this very identifying color.

THE COURT: Does the IRA ever use the orange arm bands in an attempt to decoy the British?

THE WITNESS: No. This sort of intelligence come out two or three months before that. This was on another operation, or the IRA had surveillance on the British army and seen these people wearing the arm bands. So of course it went up the chain of command and it come right down to us.

No, because every four or five weeks we get a briefing on tactics of the British Army, and it was at one [642] of the briefings I was told the SAS wore orange arm bands and, of course, the types of weapons they have and their tactics, and whatnot.

Q. Mr. Doherty, apart from having determined in your own mind that these men were SAS and British soldiers, what if anything other than that did you know about any of these five men at that point in time?

A. I didn't know anything about them, their names or nothing.

Q. To your knowledge, had you ever seen any of these men before?

A. Oh, no, no.

Q. Did you have any knowledge of who any of them were, apart from the fact that they were British soldiers?

A. No. I didn't know them at all.

Q. You described that when they arrived the shooting started. Would you describe more particularly what happended when the five men arrived at 371 Antrim Road and the shooting started?

A. They jumped out of the car. They started shooting. The officer in command, Volunteer Campbell, says "let's get the hell out of here," he said, so we tried to get down the stairs.

When we are getting down the stairs, the rest of the troops were trying to come in the front door. We went [643] back up the stairs and were trying to get out the back window, and we noticed that there was troops at the back who were wearing the same arm bands and clothes. But we noticed that one of them, which I thought then, had an American M-16 semiautomatic rifle.

We went back up, and the commanding officer Volunteer Campbell told us to take up seats—take up a stand. I was appointed to the back room. Officer Campbell done the front room and Volunteer Fusco done the stairs. We waited for a pending attack. We waited for another attack.

Q. To go back just a little bit, during the course of the initial attack on the house by the British soldiers, was anyone struck during the course of that attack?

A. Yes, there was.

Q. Who, if you know?

A. A British soldier, one of the British soldiers that jumped out of the car seemed to have fallen. He was shot in the attack. He was shot in the initial attack.

Q. Did there come a time when security forces arrived on the scene?

A. Yes. Within ten to fifteen minutes we heard the regular army coming on the scene. This is of course from the drones of the tanks that appeared. They surrounded the block and the blocks that surround the house. They [644] started to get out of the tanks and they came to the building and asked for our surrender.

Q. Approximately how many security forces appeared to arrive on the scene?

A. Oh, Jesus, it must have been about a hundred troops and paramilitary police.

Q. What happened when they requested your surrender?

A. Well, the officer in command, Volunteer Campbell, approached the window and had negotiations with—I am not too sure whether he was a colonel and a lead member of the RUC police. They asked for our surrender, but Campbell says that he wanted a guarantee, he wanted an a priest 'round to the house. The guarantee were to be a witness in case we were assassinated.

The police and the army said they would comply with this, but it would take about 15 minutes.

So there was a bit of chit-chat between that, and later on the priest came to the house. We went down out of the house and surrendered or down to the front door and surrendered to the British Army.

Q. At the time that the army and the other security forces arrived on the scene, what if you know happened to the five SAS officers whom you had seen in the front of the house?

A. Well, the SAS is a covert unit of the British [645] Army, they fall under the Official Secrets Act, so of course they don't stand about to make statements or to

apply warrants. They immediately jumped into the car and drove away from the scene and, of course, the car was part of the evidence because it was full of bullet holes and the tires were let down, so they hobbled away in the car.

Q. After the negotiations with security force member whoever it was that was conducting them were completed, did there come a time when you and the other volunteers left the house?

A. Yes, there was.

Q. What did you see upon leaving the house?

A. Well, we seen all the troops. There was armored personnel carriers, there was jeeps, and whatnot. Behind that there was a very large crowd which seemed to be a nationalist and republican crowd, with neighbors singing and cheering and sort of trying to get our morale up.

Q. What did you do, if anything, upon leaving the house?

A. Well, I put my fist up and I said "up the IRA."

Q. What happened next, Mr. Doherty?

A. We were arrested and taken to Castlereagh Interrogation Center.

Q. Was anyone arrested with you?

A. Yes.

[646] Q. Who?

A. Volunteer Robert Campbell, Volunteer Angelo Fusco and Volunteer Paul McGee.

Q. You stated that you were placed under arrest and taken to Castlereagh Interrogation Center. Where is Castlereagh?

A. It is situated in East Belfast. This is the main interrogating center for that part of the city or for the city as a whole.

Q. What happened to you when you arrived at Castlereagh?

A. When I arrived at the Castlereagh I was put into a cell. The cell was completely all white. The lights was

put on 24 hours a day and I was told that I was to be interrogated the following day.

Q. Were you interrogated?

A. Yes. I was held in Castlereagh Interrogation Center for seven days.

Q. How often over the course of those seven days were you interrogated?

A. I was interrogated three time a day: in the morning, the afternoon and at night.

Q. Approximately how long were these sessions?

A. Usually from one hour to four and a half hours on each session.

* * * * *

[692] Q. I would like to direct your attention now to the year 1971. Did there come a time when you were taken into custody by the British Army, Mr. Doherty?

A. Yes, there was.

Q. Would you describe how it happened?

A. This was during one what you call the British Army dawn raids. This was around the Christmas period of 1971, about 5 o'clock in the morning. They came to the house. Of course, we have only two bedrooms. Me mother and father slept in one bedroom and me four sisters slept in the bed in the other, so of course me being the odd man out, being the boy, I had to sleep on the floor downstairs.

So about 5 o'clock in the morning I was awoke by the sound of the tanks coming. These were coming every morning, sometimes 4 o'clock, to do certain raids and to pick up suspects as they say.

I heard the tanks coming down the street, so I jumped up and I tried to get up the stairs to warn my father and the door was kicked in. I looked around and it must have been about 14, 15 troops. They had tin helmets, their faces blackened and they had machine guns and rifles.

[693] They told me to halt, freeze or they will shoot. So I put my hands up above my head and went downstairs. They proceeded to go up the stairs and search the bedrooms. I heard them shouting at my mother and father to get out of the bed. My father did get out of bed, but my mother, who was half naked and was very embarrassed at the six or seven British troops in the very small bedroom with rifles pointed at her and told her to get out of the bed.

She of course being embarrassed said "Will you get out of the room so I can put my gown on?" A British Army officer approached her put a name Mueller-Browning to her head and told her "You Irish bitch, get out of bed."

So of course they took her out of bed and they went into the other bedroom where my sisters were. I think they were the ages of 12 to 14. I heard them crying and they were afraid and they took them out of bed. Everybody was brought down the stairs and we were put into the back room. Me and my father was told to keep our hands above our head while they went about to make a rampage in the house, pulled out bread—the only bread we had and threw it on the floor. Just the normal British Army search. They wrecked the house searching for arms they said.

They proceeded to come into the room and told meself and my father that we were being arrested and taken in for questioning. My father and myself were took out and [694] put into one of the many tanks that was there.

Q. Approximately how many tanks were there, Mr. Doherty?

A. Three. Three armored personnel carriers. This carries up to eight troops in each carrier. They are what you call an armored personnel carrier or, as the British call it themselves, pegs.

Q. Pegs?

A. We don't call them pegs. They call them pegs.

We were put into the back of the tank. A British Army officer sat facing me with his gun. We were brought into what's called Glen Ravel Street Police Station, to the British military end of the police station, as the police had one end of the police station and the British Army had the other and they were in control of the ghetto that was surrounding the police station.

We were put into a large gymnasium. There seemed to be 20 or 30 other people. These were neighbors, neighbor's sons, etc., and everybody was sitting around in a circle with their hands above their heads. The British Army was marching in between us. They took each person in for questioning until they came to myself.

When I went into the room there was a table. Behind the table there seemed to be three very high ranking British officers. I think they were majors. There was [695] troops all around the room with their rifles.

I was told to stand in front of the table and I was asked questions, questions like are you a republican? Do you know anybody who is a republican? Do you know who the IRA is? What about your neighbor next door, Mr. Smith, is he in the IRA? What political views has the woman up the street? General questions of gathering information on all the neighbors in the surrounding district.

My father was brought in. He was asked about his trade union, was there republicans in the trade union, who in the trade union belonged to any political party, was there any civil rights people in it, was there any agitators in it. They asked basically about his whole life.

We were questioned for about an hour each and then we were released in the next three hours. It's what they call screening. They bring you in—

Q. After—I'm sorry, are you finished with your answer?

A. Go ahead.

Q. After you were taken into custody and interrogated but prior to your release, were any charges ever brought against you?

A. No.

Q. Were any charges ever brought against your father?

[696] A. No.

Q. Having been released, did there come a time when you again were taken into custody by the British Army?

A. Yes, the very next night at 5 o'clock in the morning.

I wish to point out that we seen this as a harrasment by the British troops. The British troops could have arrested me the following morning because every morning I go to work I was stopped by the police once or twice and they could have took me in. Coming home from work I was stopped once or twice. The actual fact that they had to come in at 5 o'clock in the morning, kicked in the door in such a fashion, we felt very resentful of this, that they should come in in this manner.

They could have knocked the door because we had a knocker on the door and we had a bell and it was very obvious to anybody walking down the street, but the fact they kicked the door and they came in with commandoes running around the room, freeze, get against the wall and shouting at my family, etc.—

Q. What briefly were the precise circumstances of this second encounter on the following morning?

A. It was the exact same as the morning before, only they took me in on my own. I was brought in, brought through the same procedure. The British Army major told me [697] that they knew that I was Na Fianna Eireann. I stated I was a member of Na Fianna Eireann, but under the Geneva convention that's all I can say. Of course, he didn't like that. After a few hours I was released again.

Q. At the time you were released was anything said to you by the officer?

A. Yes, of course. There was only 16 at that particular time. They says, "We'll get you, Doherty, when you are 17."

Q. Did there come a time when they made good on that?

A. Yes.

Q. Describe what happened, if you would.

A. I think it was the day after my 17th birthday or the second day, I am not too sure. I was, of course, on the run. I was staying with my aunts and cousins and uncles. They were hiding me because I did expect to be arrested.

I was going down the street. I was going to mass, as a matter of fact, as it was on a Sunday, and the British Army jumped up from behind a wall and said, "Doherty you are going down for questioning."

They took me down to Glen Ravel Street and when I got there I was met by an intelligence officer of the British Army and a high ranking officer of the British Army. [698] Of course, I was only 17, I was just a young cub, you know.

He grabbed me by the ears, brought me to the calendar and says, "Happy birthday, Joe, you know where you are going."

He told me that I was to be brought to Girdwood Barracks.

Q. What is Girdwood Barracks?

A. It's the notorious torture center which was brought up in the Amnesty International reports.

Q. Were you taken to Girdwood Barracks?

A. Yes, I was.

Q. What happened to you there?

A. I was brought there and held for two days, or I think two and a half days, I am not too sure.

I was given what is known as SD treatment. This is sensory deprivation, only I didn't get as much as the rest

of the people there because I was what they called small fish. I was insignificant.

So I was put in what you could describe as a partition, like a toilet. I was put on a chair and told not to lift my hands off my knees, but I had been told—I would say this was a white wall like a peg board with holes and after about an hour you started getting very, very dizzy as the holes got bigger because you were right up close to the wall, so the holes got bigger and bigger. I [699] wasn't allowed to move and the temperature was kept very high so it was very humid. The police officers in British intelligence were walking behind us. This went on for hours and hours.

After awhile I was put into a cell. This was a round cell which was completely white and you can't even notice the door because the door is imbedded in the wall, so all you see is holes everywhere. I was told to sit in the middle of the room with my hands on my knees and not even move my head. They told me that they were watching and looking in to give me a good punch in the nose, so of course I complied and kept my head straight ahead.

After awhile they would take me in for interrogation. This is in to one of the interrogation rooms, I think it was 7, and I was put in the one interrogation room. There was special branch officers there from the RUC Police and a British intelligence officer.

Q. What happened to you in the interrogation room?

A. Well, when I went into the room, of course, they stripped me down to my underpants. They told me to stand in the corner and when I would stand in the corner they would put a rag over my eyes so I couldn't hear. They asked me about the general population, who did I know, all these sort of questions, and he wound up beating me about the back, etc.

[700] Then they would pull me underpants down and make fun of me private parts, and at a time they would squeeze them, which is, of course, of all the male members, it's pretty sore, you know.

They kept on questioning me, beating me, but they didn't seem to have any time for me as I could hear the screams from all the other blocks where they had IRA suspects and other political suspects. They came in and said "Bring him down to the number 2 room and give him the electric shocks. These were wires coming out of an electric box which they put on to people's testicles. They would give me things like this.

Of course I was scared in the main. They put me back in the cell, but I wasn't important, they just wanted to bring me in, ask me a few questions, etc. They didn't think Na Fianna was important. They wanted to know other information about the Irish Republican Army and I didn't know because I knew very, very few people that was in the Irish Republican Army.

After the two days I was told I was being released.

Q. What happened, were you released?

A. No. I was brought to the front gate. When I went to the front gate they; told me to put my hands out. I was handcuffed. It seems a pillow case was put over my [701] head and I was put into one of the tanks.

Q. Where were you taken, Mr. Doherty?

A. Well, I didn't know at that particular time until I arrived. I was put into the tank and the tank was full of troops and I was taken to East Belfast where the Maidstone Prison Ship is.

Q. When you arrived at the Maidstone Prison Ship, what did you see?

A. Well, they took me to the tank. I had my head covered, me handcuffed. They took the hood off and all I seen was this big ship sitting at the shore at the dock.

They told me to get up, so they brought me up the gangplank. When I got to the top of the ship they opened up the hatches of—the hatch.

Q. The hatch.

A. The hatches, and they told me to get down the stairs. I was pushed down the stairs.

When I got down to the bottom I was handed over to the prisoners.

Q. Approximately how many other internees were on the Maidstone at that time?

A. I would say there must have been 200, maybe two and a half hundred prisoners. They say that this is the worst conditions that I have ever spent in because we were through into the hold of the ship.

[702] Q. How long were you on the Maidstone?

A. I was there for four weeks.

Q. During your four weeks in the hold of this ship, did you come to learn who those other 200 people were?

A. Yes. They were—well, they were broke up into sections. There was members of the Irish Republican Army or—I think that was about 40 percent. The rest were official IRA, which took up another 10 percent. The rest were civil rights people, trade unionists, people who had spoken out against the government, people who just happened to have the name Sean MacMurray, which was the same name as somebody else and because British intelligence wasn't up-to-date. There was people who weren't in the republican movement down there, so the ship was pretty well broke up.

Q. How did the internees on the Maidstone organize themselves, if at all?

A. Well, they would elect a chairperson, who would be the spokesperson for the prisoners, and he would have meetings and consultations with what we call the governor, which in the United States you call the warden, the governor, or what we call on the ship the captain of the ship.

There was also cultural committees on the ship, educational committees, games committees, and also the most important one was there was an escape committee on the ship.

[703] Q. What did you learn about this escape committee during your stay on the Maidstone?

A. Well, I was told on occasions to watch at the porthole as the previous weeks before that the—the Magnificent Seven had escaped two weeks before this, so I was asked to do intelligence work, like watch out portholes and listen for guards coming because there was continual activity to get another escape on the way.

Q. You stated, I believe, Mr. Doherty, that approximately 40 percent of the 200 people interned on the Maidstone were members of the IRA. What if any contact did you have on the Maidstone with members of the IRA?

A. Well, of course, I was a member of the republican movement, so I was approached by the Irish Republican Army and they said "You are okay, we will look after you. Do you need cigarettes? You will be taking orders from us, because you are the Junior IRA," so I said, "Sure, no problem," and they generally looked after me, and they were my commanding officers, as well as the chairman on the ship who was democratically elected from the members of the ship, but it wasn't particularly a member of the IRA, but we had our own command structure and we commanded that.

Q. Were you still imprisoned on the Maidstone on Sunday, January 30, 1972?

A. Yes, I was.

[704] Q. What happened on that date, Mr. Doherty?

A. Well, of course, we knew that there was a very large civil rights march that particular day in Derry, so we were listening to the news. It came on the news that there was four, five people killed, later six people killed, and it was when we watched the 6 o'clock news that we knew the full extents of what the British had done in Derry. This is by watching the television, watching 13 people lying on the streets, British Army openly shooting people there and, of course, there was a lot of what you call sorrow on the ship and people were angry and people were openly crying that the British could do something like this.

This seemed to be—we thought on that particular day as we were expecting thirty to maybe fifty thousand people to march, that the British would listen to 50,000 people marching for civil rights and also for civil rights for the release of the internees.

So when the British were actually seen to be shooting people there, innocent people there, this brought a great change in my attitude.

Q. What change in your attitude did it effect?

A. Well, I had to say at that particular time if I were ever get to get out of the concentration camps, I was going to join the Irish Republican Army and fight for my country.

[705] Q. Did there come a time when you were removed from the Maidstone, Mr. Doherty?

A. Yes. After the four weeks I was informed by the captain on the ship that I was to be interned and that I was to be moved to one of the two concentration camps in Northern Ireland. This was Long Kesh Concentration Camp, which is situated on the outside of Belfast.

We were taken off the ship by paratroopers and put on the helicopters, troop helicopters.

Q. Mr. Doherty, before you were removed from the Maidstone to Long Kesh, did you have an interview with anybody?

A. Yes, I had an interview with the governor on the ship.

Q. Did the governor of that ship give you any document?

A. Yes, he did.

Q. I would like you to examine Respondent's Exhibit KK for identification. Have you seen this before, Mr. Doherty?

A. Oh yes. I seen this on—around the 30th of January, 1972. This is in fact my internment order.

MS. PIKE: Your Honor, I would ask that Respondent's Exhibit KK be admitted into evidence.

THE COURT: Any objection?

[706] MR. BLOCK: No, your Honor.

THE COURT: Received.

(Respondent's Exhibit KK for identification was received in evidence)

Q. So, Mr. Doherty, you are 17 years old and you have been taken to Long Kesh. Where is Long Kesh located?

A. It's located 14 miles outside of Belfast. This is a concentration camp. If I could describe it, it is all wire, of course. There are pill boxes with machine guns, search lights, soldiers patrolling the outer limits of the camp with what we call war dogs, what the British call war dogs.

The camp was actually broke up into compounds of 100 men in each compound and three sleeping quarters. These were tin huts, just like what you see on the movies of a prison camp, Treblinka, Belsen, these sort of places.

Q. How is Long Kesh organized during your period of internment?

A. Of course, like the ship, it was organized under a chairman of the camp. As at that particular time most of the prisoners weren't in the Irish Republican Army, they were just mostly innocent people or people belonging to the political parties that existed in the north of Ireland, so overall there was a chairman in each compound which represented the men. There was also commanders in each [707] compound representing the Irish Republican Army.

Q. Mr. Doherty, were any other members of your family interned?

A. Yes. My sister Ann, who is a year younger than myself. She was interned without trial the following year.

Q. For how long was Ann interned?

A. Oh, God. I think just less than a year. I had three brothers-in-law—the husbands of my three of my sisters were interned and of course a few cousins.

Q. Among all of these people that were interned, including yourself, were any charges ever brought against any of you?

A. No.

Q. How long did you remain interned at Long Kesh?

A. I remained interned, I think, for the next two and a half to three months.

Q. Did there come a time when you were released?

A. Yes.

Q. What did you do upon your release?

A. Upon my release I was picked up by the Green Cross, which is the prisoner's aid. They brought me to Belfast, brought me to North Belfast and let me out on the street.

Q. What happened when you were let out on the street in North Belfast?

[708] A. Well, as I was walking up the street on my way home to tell my mother that actually I was home, I was being released, just coming in, they say Doherty you are being released—this is during the time of IRA negotiations with the British government so the British government, to show good faith, released about a thousand prisoners. I was one of these thousand prisoners to be released.

When I was walking up the street I was stopped by British paratroopers. They told me that I was being arrested.

Q. How long had you been out of the Kesh at this point?

A. About two and a half hours.

Q. Continue.

A. Of course, the people came out of the district, all the women, because this is very—if somebody is going to be arrested on the street, all the women get out with the bins and whistles. This is to indicate to the general population of the ghetto that someone was being arrested. This would create a lot of noise and warn other people

who were on the run that the British Army were doing a raid.

All the women came in the street. My God, there must have been 70 to 90 women which surrounded the tank and they forced the British Army to release me. They weren't [709] abusive to the British Army. They persuaded the British Army that, Christ, the lad just got out of jail, give him a break, so the British Army told me "We will get you tomorrow night, Doherty."

Q. During your period of internment on the Maidstone and later at Long Kesh, you stated that you had arrived at a decision about what you were going to do when you were released.

A. Yes.

Q. Did you act on that decision?

A. Yes, I did.

Q. What did you do?

A. I went about to join the Irish Republican Army and Sinn Fein.

Q. You have told us already about how you went about joining Na Fianna Eireann, an illegal organization which was part of the republican movement. How did you go about joining the Irish Republican Army?

A. Well, I knew Irish republican volunteers in prison, so of course I got a recommendation from them that I could go into the Army.

I approached what is known as the recruiting officer. This is a staff officer on the local company. He approached me, asked me the usual questions in an interview, why do you want to join the Irish Republican Army. I told [710] him at that very young age that I wanted to fight for my country. I thought the British shouldn't be here. I thought the best way to bring peace in the country was for the British to withdraw and the best way to get the British out of the country was the traditional armed conflict.

He began to explain the aims and objects of the republican movement, the constitution. He showed me the constitution of the movement. He showed me the army regulations and orders, is what we call them, the orders and regulations. This is the standards of regulations that's in the Irish Republican Army; you know, breach of security, breach of orders.

He went about to what you call—he swore me in. This was over a Bible. This is a tradition going back to 1920. It's a bit old fashioned, but it is a Bible, the national flag and a 45 revolver. He told me to put my hand up and swore me in. I, Joseph Doherty, swore to give me allegiance to the Irish Republic and to the constitution of 1918, etc., etc. He told me that I was now a volunteer in the Irish Republican Army and a soldier of the Irish Republic.

For the next two to three weeks I was given training lectures on history of the movement, what the IRA is, guerrilla tactics, arms lectures. This was the weapons that was common at that period: Thompson submachine guns, [711] how to strip a Thompson submachine gun, M1 carbines. Basic weapons that we were getting supplied.

Q. During this same period of time did you become familiar with the command structure of the Irish Republican Army?

A. Yes.

Q. Could you describe briefly how it was then organized?

A. Well, I could maybe explain the Belfast Brigade. The Belfast Brigade comes under the commander, of course. The commander of the Belfast Brigade. Under him was the Belfast Brigade adjutant and under that was the Belfast Brigade staff, quartermaster, training officer, PRO, etc.

Belfast at that particular time was broken up into three battalions, the First, Second and Third Battalion. Each battalion had four to five to seven companies. I myself was in C Company, Third Battalion, Belfast Brigade, Northern Command, Irish Republican Army.

I was also in one of the sections in the company. I think at that particular time it was D Section. It was just based on the regular British Army. A bit, not too much.

Q. During this period of time immediately after you had joined the Irish Republican Army, just briefly what were your general duties as a volunteer?

[712] A. Of course, my duties was to be a soldier. We also had regulations like not to bring the Army into disrepute. This is, of course, being drinking in public, etc., bringing the army into disrepute by bad language or abuse to civilians, etc., but as a soldier my main job was to confront the British, the British Army as an infantry soldier.

We also at that particular time [had] other responsibilities. There were responsibilities of defense of the district, intelligence, the policing of the district and also social work or what we call the cat up the tree policy, where a woman would come around to the Irish Republican Army and say their cat was up a tree. The officer in command would sent two volunteers to get it and it sort of a broke up and we weren't just an army, we were a service to the general public inside the ghetto. We were looked up to as the police, the army, the political leadership inside the ghetto.

Q. In the Irish Republican Army, how and by whom are decisions made as to whether a particular operation should be engaged in?

A. From the highest command. If an operation was in, say, West Belfast, the operation would be sanctioned by the battalion officer in command in North Belfast Battalion OC. He must give directives or he must sanction operations.

[713] Like myself, just being a volunteer I couldn't lift a weapon and go out and start blasting at a British Army foot patrol. We must get permission, and of course after every operation you had to give a brief statement of was there a target hit, did everybody get back okay,

etc. You just can't pick a weapon out. To break one of these orders would impede you to a court of inquiry and a court marshal.

Q. We will get into those in a moment. Before we do, though, let's talk a little bit about operations. What factors would go into planning an IRA operation?

A. Of course, the operation must be secured, the fact that no civilians were to be injured at all. This was not the purpose of any operation, IRA operation. All safety regards were to be given to the civilian population and, of course, to the volunteers to make sure that they got back to base safe and without the loss of life.

Of course, over the period of a 12 to 13 year war there has been a number of civilians killed on operations, but this has been through—I suppose I can say negligence on some of the explosives officers or the commanders on the scene not sort of taken into account that a 30 or 40 minute warning was inadequate for a certain bomb.

Also warnings that were given were ignored by the British Army. This of course would give great [714] propaganda to the British government and loss of support. We would phone up and say we have planted a bomb in such and such. You have got 30 minutes to get out. There is an anti-handling device on it.

At times the British Army has ignored this. They have said yeah, okay and they would ignore the warning and let the bomb go off. This was done in 1972. I think it was in the May period, what is known as Bloody Friday. This was a great disaster for the Belfast Brigade, and when the Belfast Brigade attacked the City Center, I think there was 25 to 26 units went on the attack.

This was a large bombing. Warnings were given on all bombings. The warning was given to the police. The warning was given to the army. Some of these bombings were ignored. Most of the bombs went off with no casualties, but I think there was three specific bombs went off. It was a very, very sad day for I guess everybody, and even the volunteers inside the Irish Republican Army

felt very sad that these bombs went off because there was a lot of civilians were killed. I think there was nine civilians.

But as well as giving the warning to the British Army, there was a warning given to what's known as the St. Martin's Group. There is an independent Christian group where people who are in the process of committing suicide, etc., would phone up, I have got a problem, so as well as [715] phoning the army and the police, we usually phone up independent newspapers and the like of the St. Martin's Group.

Some of these bombings were ignored. It didn't come out until after the inquiry, I think, that the St. Martin's did admit that we got the warnings and we passed them on to the British, as the British got on that night on the television and said the IRA is out on a genocide to wipe out the population in Belfast, there were no warnings, there was no warning to the bombs.

I have to point out that the Army regulations in the Irish Republican Army is all warnings to the civil targets or economic targets.

Q. Let's talk about the regulations a little bit. Are volunteers subject to court martial for violation of these regulations?

A. Of course.

Q. What sort of circumstances would subject a volunteer to court martial?

A. Well, of course, inside the Irish Republican Army we have a court level. This is what is called an army court of inquiry. This is where volunteers like myself bring the army into disrepute being drunk—that turned up at meetings. Sort of very, very small breaches of regulations in the Irish Republican Army.

[716] Also court of inquires were to deal with, say, if a bombing mission went on and it went wrong, as out of all the volunteers that's been killed in the last ten years, at least 33 percent have been killed by their own bombs;

because they went off premature, the clocks were wrong or the detonator jumped or something like this.

So after every operation that does go wrong there is a court of inquiry. It convenes, gets all the information on what happened, how was this volunteer killed, was the ambush or the attack that carefully screened, etc., etc.

This we put forward and if charges are to be led, they are sent forward to what is known as a general army court martial. This is on a very, very high stage of the Irish Republican Army. This deals with people who are spies within the movement, people who are breaking not under torture, but giving information about the volunteers and the arms within the Irish Republican Army, volunteers who breach any serious orders.

This is like not giving enough warning as there is a directive from the brigade that you must give an hour warning, but if you knew the people could get out in time of a certain place, a 30-minute warning. If a volunteer doesn't take this into account, that he only gives a 20-minute warning instead of a 35-minute warning, then he [717] is in breach of the regulations. He goes before the court of inquiry and if he is found to be guilty—it is sort of a lower stage magistrate's court. If he is proven to be guilty of negligence, then he goes on to the higher court martial.

Q. Mr. Doherty, you had mentioned courts martial, courts of inquiry, and in an earlier answer you had made reference to operations inquiries. What if any relation do operations inquiries have on maintaining discipline within the Irish Republican Army?

A. Of course, it has a lot to do, but discipline—as the British Army have said and the Document 37, we noticed that the Irish Republic Army have a military code of ethics, that they do recognize that we have very strict regulations.

This is when we do an operation, it must be intelligence on a particular operation, civilians are the first preference in going about this operation, civilian casualties. Of

course, making sure volunteers get away, the weapons don't be caught.

So of course like the New York Police Force or ary army, you know, you watch your step and you stick to the regulations or you will face the judge, as we say in the army.

Q. Have you ever been involved in any operation [718] that provoked a court martial, Mr. Doherty?

A. No.

Q. A court of inquiry?

A. Well, I have been before a court of inquiry, yes, for bringing the army into disrepute.

Q. How did you bring the army into disrepute?

A. Well, I was very young at the time and, of course, I was only 17 or 18. I went out and had a few drinks. I sort of got carried away at a dance and I was spotted by an officer who put me on a charge. I had to face the court of inquiry the following night. I was suspended for a week from the Irish Republican Army and I was heavily reprimanded.

The Irish Republican Army take into account that we must show to the general population, that is the republicans, we show a very high light. You know, culture in Belfast, somebody who is very, very good, you would say he is a good republican. Republicans are seen as the highest stage in Irish society and, of course, of myself walking about drinking and whatnot, that brings the army into disrepute, so at that particular time I was charged, but I have had a clean record all the way through.

Q. Mr. Doherty, at the time you joined the Irish Republican Army, what was its policy relative to civilians as the targets of military operations?

[719] A. Well, military operations was the first preference. Civilians were not the targets of the Irish Republican Army. As I explained before, there has been over a number of years bombs going off, warnings not being adequate, etc. Of course, this is the fault of the Irish Republican Army.

I am not going to throw it all on the British, that the IRA over the past 15 years have done a very, very heavily bombing campaign and, of course, like all wars, which I hate to say things, I guess, that you do have civilians casualties in all war, this is proven in the Second World War, the Viet Nam war, every war you can imagine going back to the American revolution, that the war civilians do get harmed. It's a very sad fact of the war.

The IRA always issues a statement after the bomb and in the matter of whether the bomb went off wrong or not, and I think the British press can admit to this, that when we issue a statement it is true to fact. We have issued a statement saying yes, our battalion, Second Battalion did do this bomb. We apologize to the population. We sympathize with the people who maybe lost someone in the bomb explosion, there will be an inquiry into it. We will try not to let it happen again.

If you take over the ten-year period where there has been up to 11 to 13 different bombing instances, well, [720] I hate to say this, but the civilian rate is very low, although, of course, if one civilian is killed within the whole ten years it is still too high, but the Irish Republican Army has a poli[illegible]nd general regulation not go for civilian targets in the war zone.

Q. During your period of service as a volunteer in the Irish Republican Army, did this policy ever change?

A. No.

Q. Mr. Doherty, March 1973, did you have occasion to be arrested?

A. Yes. I was captured by British commandoes on March 17.

Q. Would you describe the circumstances of that arrest?

A. Well, of course, March 17 is St. Patrick's Day and the company commander put us all on standby. This is done on most occasions where people celebrate, St. Patrick's Day, Christmas day, etc., and of course being St.

Patrick's Day the Irish seem to celebrate themselves. You know, not just in New York, but back in Ireland too, so we were put on a general standby, what you call police standby to patrol the streets, to checkout the public houses and clubs and make sure that people weren't getting too much to drink, to make sure people got home, to encourage the people not be get involved in riots, and especially at that [721] particular time there was a lot of sectarian murders.

We mostly stayed around for friends, to watchout for strays, for cars, everybody celebrated. We made sure there were no riots, but generally to keep the night a peaceful night.

I was going down the street, me and these two other guys, when we were stopped by the British Army. They jumped out behind a wall again and they put me against a wall. They found that I had a weapon in my pocket, a weapon.

Q. How did you come to be patroling the streets of Belfast that night?

A. I just finished explaining. I was on patrol.

Q. On patrol for whom?

A. For whom? I was doing police patrol to make sure that nobody strayed outside of the ghetto, to make sure that nobody came in the ghetto. I was doing defense work and police work.

Q. What happened after you were arrested that evening?

A. When I was arrested I was taken back to Glen Ravel Street, to the army section of the police station, where I was brought to the cellar and given the routine torture. I will not go into that because it only repeats itself. They were looking for information.

[722] I told him as a volunteer and under the Geneva Convention that I am not saying nothing. They went about torturing me.

After a few hours they handed me over to the police on the other section of the police station. They brought

me to court and charged me, brought me to Crumlin Road Prison.

Q. Did you eventually stand trial on those charges?

A. Yes, I did.

Q. With what were you charged, if you remember?

A. I was charged with possession of a handgun. This was a starting pistol. It was an unlethal weapon. It was a starting pistol.

Q. What sentence did you receive?

A. I received one year in prison.

Q. Where were you sentenced to serve it?

A. I was sentenced to Long Kesh Prison Camp again.

Q. Upon your arrival at Long Kesh Prison Camp, did you claim allegiance with any particular group?

A. Yes. I claimed allegiance to the Irish Republican Army.

Q. What did the Irish Republican Army do in response?

A. They took me in.

Q. As a result, did you have any particular kind of [723] classification as a prisoner?

A. Yes. I was classified as a political prisoner or, as the British say, a special category prisoner.

Q. What relation did the act of claiming political status have to your political views?

A. Well, of course, in political, I am a soldier and I am a prisoner of war. In the Irish Republican movement at that particular time we had political status. This was to recognize us as different from criminals. As it were, the prison was separate from the other prisons where you would have what you call ordinary prisoners. These were prisoners who wore prison garb, prison clothes. They had to do manual work, etc.

But ourselves as political status prisoners were separate from this. We were allowed to wear our own civilian clothes. Our command structure was recognized. We were segregated from the other part.

Q. Excuse me. Your command structure was recognized by whom?

A. The British government and the prison administration.

Q. Continue, if you will.

A. Pardon me?

Q. Continue, if you will. You were explaining the differences between political status prisoners and ordinary [724] criminals.

A. Yes. Well, that is basically it.

Q. During the second period of imprisonment in Long Kesh, Mr. Doherty, were you provided any education and training by the IRA?

A. Oh, yes. I was provided with military education and also education in politics.

Q. What was the nature of this training? How long a course was it?

A. Well, I was being released at Christmas, so I was put on what is known as an officer's training course. The last six weeks I was taken, myself and ten or twelve other prisoners who were getting out, we were taken into a sort of a what you call West Point or Sandhurst training. We were taken into the six-week course where we would do drill, command jumps, unarmed combat, how to be an officer, how to give orders, how to use directives in, say, the republican movement, etc., all the basic things to be an officer in the Irish Republican Army, weapons training, etc., and then I was released on Christmas of 1973.

Q. How were you selected to receive this six-week course?

A. How?

Q. Yes.

A. Because at the beginning of the six weeks I was [725] approached by the battalion staff in the prison. They asked me would I be reporting back to the army.

This is a phrase for a person who gets out and reports back to his or her unit. I said yes, I was.

He told me, okay, you are going through a six-week training course. This was an officer's training course, and I complied with this order.

Q. I believe you said that you were released around Christmas of 1973?

A. Yes, I was.

Q. What did you do upon your release?

A. Well, the day of being released I was told by the commanding officer, I think it was F Company then, Cage 13, as the camp was broken up into companies, that I had 24 hours to report back to the army. Of course, when I got out, I met my mother and father, no less, but late that night I met someone and told him I was reporting back, and he said okay, have a week or two off.

I told him that I wanted just a week off, that I wanted to get straight back into the Army.

Did you get straight back into the Army?

A. Oh, yes.

Q. When you reported back, what if any additional responsibilities were you given at that time?

A. Well, I was commissioned as a staff officer in C [726] Company, Third Battalion, Belfast Brigade. I was given the specific position of quartermaster, which is a staff officer's position. Company staff officer position.

Q. What were your duties as the quartermaster of C Company?

A. All quartermasters have to look after arms, the dumping of arms, the cleaning of arms, the distribution of arms, gathering ammunition. If I was short of 9 millimeter rounds, you have to approach the batallion quartermaster. And told him I needed certain supplies in my company area and that was my general job, and also making decisions inside the company.

Q. Where were you living at this time?

A. I was living in what's known as on the run. I didn't stay in my own house.

Q. Why were you not living at home?

A. Because internment was still on at that particular period and orders were given to all staff officers who were known to the British to stay out of the home, so I stayed in sympathetic homes.

Q. During your period of service as quartermaster, did there come a time when you were again arrested?

A. Yes. I was arrested again on—I think it was the 1st of February, 1974.

Q. Would you describe the circumstances leading up [727] to that arrest, Mr. Doherty?

A. I got a communication from the battalion quartermaster in the Belfast Brigade that I was to ship explosives up to the First Battalion which is situated in the upper west of Belfast. They said that they needed supplies across the city and I was to supply them, so there was a car supplied and I put 80 pounds of explosives in the car. I was to meet the other quartermaster at a certain point in the city.

On the way to this point, going out of the ghetto, I was stopped by the British Army.

Q. What happened?

A. I was arrested. They searched the car and I was taken away for questioning.

Q. Were you eventually charged?

A. Yes, I was.

Q. With what were you charged?

A. I was charged with possession of explosives.

Q. Were you tried on these charges?

A. Yes.

Q. What attitude did you take toward the court during these legal proceedings?

A. I informed the court that as a volunteer in the Irish Republican Army. I refused to recognize the jurisdiction of this court as a foreign court and as a [728] republican I wished to be seated.

Q. How did your action in refusing to recognize the court relate specifically to your status as an IRA volunteer?

A. Oh, this is the army regulations as well, that all volunteers being arrested and on the event of being convited at the trial, they must refuse to recognize the court.

You could ask for permission to recognize the court from the Army by sending a communication from the prison that you wished to recognize the court, but I got the communication that I was to not recognize the court.

Q. What was the outcome of these proceedings?

A. I received ten years.

Q. Pending this trial where you were eventually sentenced to ten years, where had you been held?

A. I was held in Crumlin Road Prison.

Q. During that period of time were the IRA volunteers in the Crumlin Road Jail organized along roughly the same lines you described earlier?

A. They were organized as a battalion.

Q. What if any committees existed among the IRA volunteers in the Crumlin at that point?

A. Of course, like all IRA prisoners, when you get three or four IRA prisoners together in the a [*sic*] prison, three [729] or four prisoners organize or select someone to be leader and also they gather themselves in an escape committee. You know, the duty is to escape.

There was an escape committee existing at that time.

Q. What if any contact did you have with the escape committee?

A. Well, myself and another volunteer came up with an idea to escape. We drew up the plans, as you don't walk to the escape committee and say, hey, I want to go over the wall. You must go with plans, how much rope you need, how many blades, how long it will take you to get out, etc.

So me and this fellow—me and this other volunteer came up with this idea to get out of the prison. We

formulated the plan. We brought it to the escape committee in the command of the jail. He looked at the plans.

He said it was pretty good. He says "I'll send out word to the brigade."

The brigade sent in word to let them go ahead because there was escapes every day from the Crumlin Road Prison. People was always digging holes in their cell, digging holes in their wall. People was going over the wall, hiding under food trucks. It was a constant thing.

So myself and the other volunteer went about to [730] saw the bars in the cell and one particular night we got through the bars about 4:00 in the morning. We were dressed as commandoes, what you usually see.

We got down the wall and went towards the wall to the outside of the prison and we were caught. The searchlights went on and we were captured.

Q. Did you receive any additional sentence for the escape a attempt?

A. Yes. As well as the ten-year sentence, we got 18 months jail term for the escape—escape attempt.

Q. So your escape was unsuccessful, you are returning to the Kesh for a third time on a ten-year sentence on possession of explosives. Approximately how old are you at this time, Mr. Doherty?

A. I think I was 19 years of age.

Q. Did political status still exist at the time of your third round of imprisonment?

A. Yes, it did.

Q. Did you claim allegiance with any particular group?

A. The Irish Republican Army, as before.

Q. What was the response of the Irish Republican Army?

A. I was claimed as a member of the Irish Republican Army.

[731] Q. How were you classified in 1974 at the Kesh?

A. As a special category prisoner, or as we say, a POW.

Q. Again, Mr. Doherty, without going into extensive detail, but if you would, how did captured IRA volunteers organize themselves in the Kesh at this time?

A. Well, I will try not to go into much detail, but again the camp is broken up as a battalion. As that particular time there were two battalions in the camp. The internees who were situated in down camp were organized into a battalion. Up camp was the convicted political prisoners. They were also known as a battalion.

We had the battalion officer in command, the battalion adjutant, his staff. Each cage was broken up into 100 men. It is a wife cage with huts in it. They were broke up into companies, A company, B company, and the company that—I was in most of the time in Long Kesh was C Company.

Inside the cage, of course, were the officer in charge of the cage or the company OC, the company adjutant, the company staff, quartermaster, drill segreant, etc., and the huts were broken up into sections. Of course, the volunteers. Of course, in each cage there was an escape committee and then the battalion escape committee, they were to coordinate all escapes, etc.

[732] The battalion quartermaster, he was in charge of all the battalion equipment. That would be ropes, wire cutters, shovels, bulbs for the tunnels. Everything that was to do with the tunnels or escapes, and cameras, of course.

Q. Mr. Doherty, I take it you are pretty familiar with Long Kesh?

A. Oh, it is a second home.

Q. I am handing you an exhibit, Mr. Doherty, marked Respondent's Exhibit QQ for identification. Would you look at that, please, and tell me if you can identify what that shows?

A. Yes. This is the map area of Long Kesh or what —the British tried to change the name to the Maze. This was opened in 1971. It was an internment camp, but Britian being embarrassed that this was the only

concentration camp in Europe since the Second World War, they tried to change the name. They came in and told us don't call it Long Kesh any more, it is the Maze prison. This is to give respectability to the rest of the world.

This is like the Germans changing Treblinka and Belsen Camp to Flower City and Sunshine Camp. It was to give a reflection to the rest of the world that we have closed these camps down. So this is what you call the old Long Kesh camp.

[733] In 1974, I think, they started building what's known as the H-Blocks. This is for the impending criminalization policy that the British was going to bring in. This is, of course, the camp.

Q. Would you please, with the pen that I am giving you, designate—circle the area in red where prisoners with political status were kept during your stay at Long Kesh?

A. This was the actual camp. There was I think 23 cages with 90 men in each cage. There was, I don't know, a few thousand in them.

Q. The area that you circled, is that the area in which you were kept during your stay?

A. Yes.

Q. Where were the ordinary criminals kept?

A. Well, the ordinary criminals were kept at the very corner of the camp. The only reason why the ordinary criminals were in the camp was because they were cooks. They wouldn't let us go down to the cookhouse with all that equipment, because we would take it for tunnels or some means to go out, so they brought the ordinary criminals from the other prisons to be cooks, do the laundry, etc., bring all the food up to the H cage, so they were way down in the corner of the camp. Think were kept well away from us.

[734] MS. PIKE: Your Honor, I would ask that Respondent's Exhibit QQ be admitted into evidence.

THE COURT: Any objection?

MR. BLOCK: Relevance, your Honor.

THE COURT: It's not very relevant, but I take it a lot of evidence in this case has bordered on the irrelevant, so I will take this too.

(Respondent's Exhibit QQ for identification was received in evidence)

Q. Mr. Doherty, during this period of imprisonment, did you hold any staff positions on the IRA staff?

A. Out of the ten-year sentence that I was given, I served five years and nine months, so over the long period of time I held several staff positions in Long Kesh, from the section leader, company staff, officer's position. I was a company quartermaster, a company training officer, a company drill sergeant—well, we call them a drill officer. You call them in the United States Army drill sergeants. I was in charge of the men in the yard and military formation, etc.

After that I was a company—my God, I was everything—a company finance officer, and the highest rank that I have ever held inside the company was the company adjutant. I was the second in command of a company of 78 men.

* * * * *

[CROSS-EXAMINATION]

[767] Q. Protestant paramalitarists.

A. Yes. As I stated before, my house was on the fringe of the ghetto and, of course, on the fringe of the ghetto, since I was in jail, I had contact with a lot of Protestants. I have got cousins that's Protestants. Half my family is Protestants. So I had some sort of connection. With this connection I knew some of the Protestant men that was entering the district.

Q. And it was after this incident that you joined the IRA Boy Scouts, right?

A. Oh, no, no, no.

Q. Sometimes after that, I mean.

A. Yes. It must have been a year or maybe fourteen months. I am not too sure. It is when I come back from

London. When I come back from London, I think I come back around September of 1970 or even before that. I am not too sure.

Q. You were telling us on direct examination about St. Patrick's Day 1973.

A. Yes. March 17, I believe it was.

Q. You were arrested by a British Army patrol?

A. Yes, marine commandos.

Q. Were you alone or were there others with you?

A. I was with three other men. I was arrested with three other men.

[768] Q. You happened to be out on the street because you had been assigned to hold yourself available in case your services were necessary, is that right?

A. Yes. It is what you call a standby. When you are on standby patrol, you would be approached one night and told you are on the 24-hour patrol or 24-hour standby, and we go on standby. This is in case you have to be called up or you get any direct orders.

Q. At least as far as you understood it, what were you standing by for, that is if you had been called out to go on duty, what would the nature of your assignment have been?

A. Well, it varies from defense work, generally patrolling the streets, police work, making sure nobody gets overcelebrated with drink, if you understand what I mean.

Q. In plain and common terms, are you saying that you were supposed to be available in case some people drank too much and got rowdy in honor of St. Patrick's Day?

A. Yes.

Q. You were supposed to make sure they got home safely and didn't fall over themselves or get into fights with each other?

A. If you take the street I was arrested, I think it was Upper Mather Street, this is one of the fringe [769] streets. You usually get people who would maybe be drunk, or something, you get some fellow would be drunk

and he would probably walk to the fringe, he would turn left instead of right and walk maybe into a Protestant ghetto or walk on to one of the main roads.

It was—generally the Irish Republican Army would be on patrol or Na Finna Eireann or else the auxiliary.

Q. How was the starter's pistol going to assist you in performing those duties?

A. My God, I wasn't going to shoot anyone. In case maybe somebody got overdrunk and said who are you, or what, so usually what you should do is open your coat, this is the standard procedure of the Irish Republican Army, that you would open your coat, because the IRA don't have police badges or police hats or a bandolier.

So, of course, when somebody—maybe somebody is against your authority, you would go Irish Republican Army or auxiliary IRA, or whatever.

Q. A gun was going to be your identification, is that what you are saying?

A. Pardon?

Q. In case someone challenged your right of what to do, the gun tucked in your waistband would be your identification?

[770] A. Yes. The IRA haven't much arms and of course the arms that was there, that was the first one that was given to me. There was a number of arms, of course. The other two men were also carrying arms, but I think they had a .45 and a .38 which had no bullets in it.

Q. Did you tell us that you were arrested and ultimately convicted and went to prison for about six months or seven months?

A. I received a one-year sentence. Back in the north of Ireland you serve two-thirds of your sentence, so it would be nine months out of the year.

Q. Then when you came out, you reported back to your commanding officer, is that right?

A. I reported back to the Irish Republican Army, yes.

Q. You said you reported back to the army, but it is a little bit difficult to report to the whole army. You reported to some body or some bodies in particular, right?

A. You report back to the local company, unless you were assigned to a battalion from inside the prison. But at that particular time I was only a soldier on parade, whatever you call it. When I was released from prison, I was told "report back to your local company."

Q. And that's what you did?

A. Yes, of course.

[771] Q. That was about Christmas of 19—

A. '73.

Q. '73, is that right?

A. That's correct, yes.

Q. Was that about the time that you assumed the duties of being company quartermaster?

A. Yes.

Q. That was a promotion of some kind?

A. Yes. You could say within the company, yes.

Q. Excuse me?

A. You could say within the company. The level is the volunteer—well, all members of the Irish Republican Army are volunteers because it is a volunteer army, but we have—at that particular time you have section leaders, staff captains, staff officers, adjutants, all the way up, so I was appointed to the next stage up, which is a staff officer's job.

Q. Then you said that you received a direction from —was it the brigade or the battalion?

A. Yes, the battalion, which got it from the brigade.

Q. To do what exactly?

A. Well, we received a communication down from battalion that we had to make contact in the first battalion, which is situated in West Belfast; that they [772] were looking at explosives, so I got in touch with an engineer—an engineering officer is a staff officer's position in the Irish Republican Army. I received a communication from the battalion QM that the first battalion

were looking for around about 80 to 90 pounds explosives and I went about to do that.

Q. You had to go somewhere to get the explosives, right?

A. Yes. This is in a dump, what we call a dump.

Q. A safe hiding place?

A. Yes.

Q. A storage place?

A. I didn't know where it was. This was the engineer's dump, if you know what I mean. My particular job was quartermaster, to look after arms, not explosives.

Q. At some point you came into physical possession of those 80 or 90 pounds of explosives correct?

A. Yes, I did.

Q. Where were you and where were the explosives when you came into their possession?

A. As I said, it came under the company engineer.

Q. What I am really asking, Mr. Doherty, I am not asking for the street address, but were you on the street, in a garage, on a boat in the harbor, that kind of thing.

A. Well, the New Lodge district is a very small [773] district, so I can't say a church, because there is only one church. It was in a—I could say a garage, a type of garage.

Q. You were assigned the responsibility of seeing that these explosives would be transported to another part of the city, correct?

A. Transported, yes.

Q. What did you do to try to fulfill that responsibility?

A. I tried to do it to the best of my ability, to transport it to West Belfast.

Q. You don't pick up 90 pounds, put them on your back and go walking across the city, do you?

A. No, of course not. There was a car provided by the unit.

Q. A car provided by the unit?

A. Yes.

Q. From the motor pool? This is an army without a motor pool, right?

A. Of course. There is no motor pool.

Q. How was the car obtained?

A. The car was obtained by the company through highjacking the car.

Q. When you say that, what exactly do you mean?

A. It's going and taking somebody's car. This is [774] very common within the Irish Republican Army.

Q. Taking possession at gunpoint or with the threat of force if the person does not relinquish the car?

A. Usually volunteers approach persons who have a car, usually on the main roads of the district. They would approach the person, state as a member of the Irish Republican Army and under the laws we are commandeering your car.

Q. Under the law?

A. Of course, it is not exactly word for word.

Q. Under the law [you're] commandeering the car?

A. I'm sorry, under the war procedure. It depends on each company, but what it usually is, we are taking your car, Irish Republican Army.

Q. That's generally regarded within the Irish Republican Army as a preferable means of obtaining automobile transport than using some member's car or stealing a car from a place where it's parked?

A. Well, there are times that cars are merely taken out of car parks, but we are not experts in taking cars and that procedure. The company OC said he would provide a car and apparently he got volunteers to go out and highjack a car.

Q. You mean it would be too difficult to break into a locked car and start it up without keys, for the Irish [775] Republican Army to accomplish that?

A. The company commander at that time must have took the initiative that he needed a car quicker, but I am not too sure. As soon as he got the car I was in prison. He just said he was going to provide a car and they went out and got a car.

Q. You were arrested by the army patrol with the explosives in the car and there was another gentleman in the car, was there not?

A. Yes, there was.

Q. Mr. Hehir?

A. Hehir.

Q. I take it that Mr. Hehir was another member of your company of the Irish Republican Army?

A. Yes, he was.

Q. At the time.

A. At the time, yes.

Q. Then you and he found your way together in the Crumlin Road Prison, correct?

A. Yes, we did.

Q. You were imprisoned in the same part of the jail, you and he together?

A. Yes. As a matter of fact, we were in the same cell.

Q. The same cell. And it was with him that you [776] sought to saw out the bars of your cell to make an escape, correct?

A. Correct.

Q. That particular escape attempt, that is something you undertook at your own initiative?

A. Of course not, no. I have explained before that we have to go through the authority inside the prison and out.

Q. The means by which you were going to escape, was that something that you and your cellmate drafted up?

A. Yes.

Q. And proposed as a plan up the chain of command?

A. Yes. To the escape committee. They are the people in the prison who deal with it. The battalion OC's decision and the battalion OC's responsibilities are the social welfare of the prisoners. He designates different people to jobs, education, intelligence, training. He is the centerpoint, and also he has an escape committee to deal with all the different aspects of escape.

Q. Mr. Doherty, when you went into the Crumlin Road Jail in 1974 after being arrested with the explosives in the car, how did you know that the people claimed to be the escape committee were in fact the escape committee?

A. Because I knew.

Q. I am asking you how you knew it.

[777] A. Well, I was a volunteer. At that particular time I was a section leader on the third floor. As the Crumlin Road Prison is built on a three tier system, there are the what you call the ones, twos and threes and on each tier is a company, A Company, B Company, C Company. I was on C Company, which was number 3 level, and I was a section leader up there, so of course I had contact with staffs and I had contacts with battalion staff in the prison.

Also I knew some of the IRA prisoners from the past being in prisons and of course outside, so after awhile, I explained before that the escape committee is not a secret committee, it is a semi-secret committee.

Q. What does that mean?

A. I mean they don't walk about—well, you have the prison authorities know who the quartermaster is, he knows who the training authority is. As the prison authorities come in to the wing, they would say to one of the people, can I speak to your quartermaster, and John or Paul or Mike, they would have negotiations with the quartermaster over food, eggs, bacon, whatever is the shortage, but the escape committee is a semi-secret committee within the army and the prison.

So while the volunteers might know who the escape committee was, not necessarily the prison authorities, sir.

[778] Q. You were released from Crumlin Road—

A. In September of 1974.

Q. September or November?

A. November it could have been.

Q. Of 19?

A. '74. When I was released from the Crum and went to Long Kesh?

Q. Well, when were you released from confinement for the charges to which you were convicted of the explosives and then the escape?

A. Christmas of 1979.

THE COURT: So you served what, abopt five and a half to six years?

THE WITNESS: Five years and nine months exactly. Back in Northern Ireland you do three-quarters of your sentence, but when they brought the criminalization policy in, plus with the negotiations of the '75 truce, this was a ceasefire that the IRA had with the British government, I think there was certain concessions and one of the concessions was that the three-quarter sentence should be brought down to a half, so if a person gets 12 years he does six instead of originally doing eight out of the 12.

Q. When you were released in late 1979, where did you go to live?

[779] A. I went to live at Spanner Street, which is in the New Lodge district of North Belfast.

Q. Did you seek employment at that time?

A. Seek employment?

Q. Yes.

A. There was no employment. Very, very little.

Q. Did you try?

A. Well, of course. I asked around. I got maybe a day work here and a day work there. I can maybe point out that getting out in 1979 I was approached by the Irish Republican Army—I was told when you get out this time keep a low profile. That meant by getting out I wasn't to tell people and go back to the army, I was to put on a profile that I was what you call tired of being in prison, all this here, not express your republican views too much. Keep a low profile. Go out with girls, have a good time, but don't get too involved with the British Army. Let the people know that you are living normally as you could probably say back in Belfast.

Q. Part of that would have been to take up employment in your craft as an apprentice plumber, is that correct?

A. Yes, but with the plumber, when I we interned, of course, I lost my job. That ceased. I think the time I done plumbing was maybe 18 months to two and a half years, [780] so of course I hadn't got a trade when I got out.

So when I was released in 1979, Christmas of 1979, I looked about to try to get a job here, but there was no work. If you take a ghetto situation with up to 42 percent unemployment, a person like myself getting out of prison, you will have to cue up, as they say, you know.

Q. How did you support yourself then?

A. My parents supported me. Also I collected at that time a few weeks unemployment benefits.

Q. That was paid for by the British government?

A. Of course.

Q. May 2 of 1980 you told us that you were at that address Antrim Road?

A. That's correct.

Q. Between the time you were released at the end of 1979 and May 2 of 1980, what activities as a member of the Provisional Irish Republican Army did you engage in prior to the events of the second of May?

A. Well, of course, as you notice, that was a very, very short time period.

Q. That was longer than you had been at liberty any time in the past.

A. Yes. That was, what, four months, three months?

Q. Five months.

A. Five months? It's getting up.

[781] Five months. Well, of course, when I was released from prison I reported to the army. I made my contact with the Irish Republican Army. They told me that I would be assigned to an active service unit of the Belfast Brigade.

Of course, it was pretty new to me coming out of prison, as I explained before, the different sections of the Irish Republican Army. I was taken by the Belfast Brigade and sent on an officers' training camp. This officers' training camp was broken up into arms training, drilling, the directions in which the war was going, especially on the SAS, as the SAS was being more and more since 1976.

I was given a breakdown on SAS surveillance. I was given further political lectures, etc. I was given an update, and this took up to four or five weeks. It was what is called breaking me in as being an active service volunteer.

Q. That took four or five weeks?

A. Four or five weeks, plus I didn't report back until January. I reported back the first day. I think it was in November and I was told to report back after Christmas.

Q. This camp was somewhere outside Belfast?

A. Well, it was outside of Belfast. I will give [782] you that.

Q. Mr. Doherty, when the camp was concluded, was that when you joined an active service unit?

A. I was assigned to an active service unit, yes.

Q. When was that?

A. It was around the—

Q. What part of 1980?

A. January, February.

Q. An active service unit, that has how many people?

A. Well, it varies from six to ten men.

Q. The three other volunteers who you mentioned in your testimony, Dingus McGee, Fats Campbell and Angelo Fusco, they and you were in the same active service unit on May 2 of 1980?

A. On May 2 of 1980, yes, we were in the same active service unit.

Q. Is that the unit that you were assigned to when you completed your training outside Belfast, your officer's training?

A. Yes, of course.

Q. Between the time when you were assigned to the unit and May 2, 1980, what other activities on behalf of the Provisional Irish Republican Army did you participate in?

A. I participated in a lot of activities. It [783] included intelligence gathering.

Q. What did you say?

THE COURT: Intelligence gathering.

MR. BLOCK: Thank you, your Honor.

A. You will have to excuse the accent.

Intelligence gathering, going with the active service commander. He was breaking me in. As I said, he would show me the routine, because as I explained before, I had been in prison five years and nine months, so I was sort of, as you could say, out of the scene a bit. I had to reacclimatized to the change of the war, which was far more faster. So I was doing sort of what you call nitty gritty work.

Q. Did you engage in any action situations prior to the second of May 1982?

A. No.

Q. When did you first receive your instructions about the activities scheduled for the second of May?

A. I received I would say 48 hours after the actual operation.

Q. What were you told and how were you told it at that time?

A. Well, I was told that there was an operation coming off in two days and that I was appointed to be on it.

THE COURT: Were you told orally or in writing?

[784] THE WITNESS: I was told orally at a meeting because we try and cut down as much on communications by—

THE COURT: Written?

THE WITNESS: Written, as much as possible, unless it's in the prison, because we don't really talk across. It is usually by communications.

Q. Did you know at that time, two days before, who you were going to be assigned to this task with?

A. No. Not really. I just knew that Volunteer Campbell was to be the operations officer.

Q. When did the essential parts of this plan become revealed to you?

A. As I said, 48 hours before I was told I was going on an operation. They told me whereabouts it was. It was in the North Belfast area. He explained to me the extent of what the operation would be.

Q. What were you told? What I am asking is exactly what you had been told as best you remember it, Mr. Doherty.

A. I am just about to tell you that I was told it was going to be an operation involving attacking on British armed troops and I was told—of course I would be asking questions, what do you mean patrols, where they come from.

He explained there will be army activity on the Antrim Road on this specific day. At one specific meeting there was an intelligence officer and he explained the [785] target area. Of course, I had a lot of knowledge where really it was because it is situated in North Belfast.

Q. You were familiar with the area?

A. Yes, as a kid, when I was young.

Q. When did you learn who the ther people on this mission were going to be?

A. The night before.

Q. The night before.

Again, at a meeting where you saw people face-to-face?

A. Yeah, you could say that.

Q. Did you learn some more about the proposed operation the night before?

A. Yes. We were told that there was a house on the Antrim Road; that most of that block, I think, was apartment buildings and we shall be taken over one of the houses and use it as a house.

Q. Did you know which house you were going to takeover?

A. No.

Q. Did you know if the house was occupied?

A. As I explained, that was an apartment building and apparently one of the intelligence officers says that there are people living in the building, but as far as we know, the third floor is vacant or the second floor is [786] vacant, whatever.

So I took it as far as what he says that it was a vacant apartment building except for one person, I think, as that was living there on the first, second, third floor. It wasn't fully occupied as far as we knew.

Q. Are you saying there was no discussion about the necessity of taking hostages?

A. No. The general policy of the Irish Republican Army, we never take hostages. This is a general order. The IRA has never been in a position to do that.

Q. Was there any discussion the night before about why this particular row of houses on the Antrim Road had been selected, apart from the fact that it was unoccupied?

A. Well, of course, the target area itself where the shooting occurred, there were traffic lights. If you are looking out the window of the house where the gun battle had taken place, there is traffic lights on the left-hand side and apparently here they drew up the intelligence on it that this was the best place. Of course, everybody knows where you have traffic lights, you have a better chance of slowing down or stopping at these traffic lights.

Q. Was there some discussions about how the attack was going to be made from this house, what kind of weaponry was going to be used?

[787] A. Yes.

Q. [What was] discussed on that subject?

A. I was told the night before that an M-60 machine gun will be on the scene, a Belgian Air Fan and also a Hackland & Clark rifle. It's an American rifle, I think, American-German.

Q. That's three weapons you are talking about?

A. Three weapons, yes.

Q. How many people did you understand were supposed to be on this mission?

A. The night before? Four.

THE COURT: So one person was not to have a weapon?

THE WITNESS: Yes. One person was the driver, which was Paul McGee, who was situated down the stairs. Paul McGee—there was another weapon on the thing, but there was no magazine in it. It was just a weapon. I think it was a Japanese pistol. I am not too sure. I forget the name of it.

Q. An Astra, does that sound right?

A. Yes. Well, I thought it was—I think the Astra looks like a Japanees pistol. This was handed over by a Marine who was fighting against the Japs or something and he handed it over to the IRA later on. It is a Japanese officer's pistol which he took off a Japanese [788] officer.

Q. You of course knew what an M-60 machine gun was, didn't you?

A. Of course, yes. It's an American machine gun. It's the standard weapon of the American military forces for some 20 years.

Q. You knew something about the history of the use of that weapon in Northern Ireland prior to the second of May 1980, didn't you?

A. Of course. It was on the news that the Irish Republican Army had received M-60s since the beginning of 1979 or the end of 1978; they are weapons of the American M-60 that were in the country.

Q. But you knew, did you not, that that particular kind of weapon had been used on several occasions earlier in 1980 and during 1979 to shoot out and to murder members of the security forces?

A. Yes, I heard that the weapon had been used on IRA operations.

Q. And on a solicitor?

A. On a solicitor? I am afraid I am a bit lost on that.

Q. A gentleman by the name of Donaldson.

A. Donaldson? I know the solicitor was killed about that time.

[789] Q. You don't know about Mr. Donaldson being a solicitor, do you?

A. A solicitor? Yes. This was an incident where there was an attack on a military installation. I think the person was coming out of the military or police installation when shots were fired and this person was killed.

The IRA issued a statement. I can only go on the statement that the IRA had issued. The IRA issued a statement saying that they regretted the death of this person; that the intended target was the military post or whatever it was. I think it was in the west of Belfast that this incident occurred.

Q. When you had this meeting the night before—

A. Excuse me, you were say the M-60?

Q. It wasn't the M-60, it was a different one of the weapons?

A. No, you told met it was the M-60.

Q. I was just asking.

A. I am just saying that I don't think it is.

Q. Which weapon do you think it was?

A. I am not too sure, but I know it wasn't an M-60 because I think it was—I think going back then it was used from a car or something.

Q. When you had this meeting the night before, Mr. [790] Doherty, was there some discussion about how to

eliminate risk to civilians on the street if you were to shoot at this British Army convoy when it was stopped at the traffic light from one of those buildings on Antrim Road?

A. Of course I was.

Q. What was discussed on that subject?

A. It was discussed that—what is normal, that civilians are not the target and we were to make sure that the military vehicle was quite severed from any civilian vehicle that was about, because usually in Belfast there is a military vehicle, civilian cars usually—if the vehicle is in front, they stay well back, and if there is a vehicle behind you, you push on.

I think it's not just the civilians think this, the army themselves so they can get away quick. They don't want to be caught in a traffic jam. So if there is a car in front or a car behind, the troops that are sitting in the back of the tank tell the car to go back in case they have to get maneuvered, in case they come under rocket attack they want to get out quick.

So usually when military convoys come down, they are usually on their own. Of course, this still brings risks to civilians, but we were told on this particular occasion, like all occasions, watch for your target. Aim at your target and watch for the surrounding vicinity of [791] the target.

Q. Was anything discussed the night before on the subject of a police station being built, almost completed down the road from where this house was on Antrim Road?

A. Well, there is a police station being built up the road, I think, on the right-hand side going north. There is a place built, but it's only the concrete foundation.

Q. So that was not the target?

A. I doubt it. I don't think so, no. No.

Well, of course, but I am trying to see what you are thinking. The actual police station, I think it's finished now. It's a 12-story police station far to the right. Let's

say about maybe 50, 60 yards. Of course, there is Belden's in front of it and the police station is in the center. It's pretty hard to explain unless I had a map here.

Q. On the morning of May 2, what time was it, approximately, when you rendezvoused with your comrades?

A. My God, it must have been 8, 9 o'clock in the morning.

Q. You rendezvoused in someplace, I assume?

A. Yes, I did.

Q. How did you get from that place to the Antrim road address?

[792] A. In cars.

Q. More than one?

A. Yes, there was one car and also there was a van used for the actual operation.

Q. When you say used for the operation, what do you mean?

A. It was the van we used to get away.

Q. It was to be the escape vehicle?

A. Yes. You could say that, yes.

Q. Where did that van come from?

A. Well, I found out at the trial that it came from the New Lodge Road area, which is 100 or 200 yards from the target area.

Q. You didn't know that prior to sitting in the courtroom during your trial that that's how the van had been obtained?

A. No, I knew long before that.

Q. It was highjacked, was it not?

A. I found out later that it was highjacked. A van had been supplied to the active service unit.

Q. The gentleman from whom the van was highjacked was held hostage the better part of the day, isn't that so?

A. As I said, the van was supplied to us. We didn't ask where it came from. As I said, it is a secret army.

It's very tight knit. You don't go where did you [793] get this or whose house did you stay at?

I was told the officer in command said we have got a van supplied to us and the van was at the back of the building of the target area.

Q. As you sit on the witness stand here now, you don't know whether or not the statement I made is accurate?

A. The van was highjacked?

Q. That it was highjacked and the gentleman who was driving it before it was highjacked was held hostage for the better part of a a day.

A. Yes. Of course. Of course he was held there.

Q. How did the weapons get to Antrim Road?

A. The weapons were supplied by a quartermaster.

Q. You don't know how they got to the Antrim Road?

A. When I got to the Antrim Road the weapons were there.

Q. Who were they with?

A. They were with the quartermaster.

Q. The quartermaster was not yourself or one of the other three people you mentioned?

A. No, we are active service volunteers.

Q. So you are saying the members of the active service unit met up with the quartermaster who was there to deliver the weapons?

A. He came in a vehicle and supplied the weapons.

[794] Q. After the quartermaster supplied the weapons, what did you, Mr. Doherty, do?

A. Well, as soon as the quartermaster supplied the weapons, the officer in command said we are going to take the house. Two volunteers. I am not too sure whether it was Volunteer Campbell or Volunteer Fusco or Volunteer McGee—I was separate and most of them went to the house. They went to the house and a lady came to the door.

Q. You didn't go, is that what you are saying?

A. Myself? The first one? No, I didn't go. If I did go I would say it because we all take responsibility for taking the house.

Q. Two of them went to the door of number 371?

A. Yes. Correct.

Q. Expecting to find no one there?

A. No, as I said, we knew through intelligence reports that some part of the building was occupied. Well, if we knew that no one was there, it would be pretty silly to knock on the door. The volunteers knocked on the door, as I explained, a lady came to the door. One of the volunteers, I am not too sure, said to her "IRA. We are taking the house over."

Q. What time was that about?

A. My God, it would be maybe 10 o'clock in the morning, maybe 10:30.

[795] Q. Then you went along with the other person that remained behind into the apartment?

A. Yes.

When I got in to the house the person or persons, or the family as I got to know them, were downstairs in the bottom apartment. They were in the bottom apartment. They were put into the bottom apartment and I proceeded to go up the stairs.

Q. How many people were there in that family?

A. My God, I don't know. I think it was three. I think there was a woman, one of her children and her sister and her husband.

Q. They were not all there initially?

A. No.

Q. These people came and were taken hostage?

A. I didn't know as I was up the stairs, but I heard the door being opened and someone coming in. Of course, we knew essentially afterwards that her husband had arrived and her sister had arrived.

Q. What were you doing upstairs?

A. I was upstairs. We were told to go up the stairs to secure the building. We checked the second floor. I think one of the other volunteers went to check the third floor. I checked the bedrooms on the second floor and we proceeded to assemble the weapons.

[796] Q. How long did that take?

A. 30, 40 minutes maybe.

Q. So by what time of day were you ready to attack the convoy if a convoy should come into sight?

A. Well, as soon as the weapons were assembled and we got the briefing. As before every operation, the officer in command would sit there and brief us again that we are going to hit this certain target coming down. Watch where you aim. Keep at least five rounds in the magazine, because I got one and we hadn't got any spare magazines. Watch what you are firing at. Take aim at the target. Don't over access the fire power. In other words, don't go crazy with the gun. This is a normal procedure we go through on all operations.

Q. What did you mean keep at least five rounds in the magazine?

A. This is in case we had to get out. Well, after the operation, if we all went down to the van with no bullets in the gun, then we would be in jeopardy.

Q. The expectation was if you fired on a British convoy, it would not take very long for the British Army to trace the source for the firing point and to come and try to capture you, is that right?

A. Well, it's what you call the trap. Once we get into the van, trying to get away, in case we come up [797] against a roadblock, we can maybe shoot our way out or give what we call cover fire. It's firing a number of rounds to keep the British Army down while we can get away in the car or by foot.

Q. What time was it, if you remember that morning, Mr. Doherty, when everything was in place and all that

was missing was a nice slow moving stopping for the light British convoy?

A. This would be in about maybe 11:30 or 12, when initially everything was got under way.

Q. You just sat there for two hours or so waiting for a convoy to come by?

A. Yes.

Q. Nothing came by?

A. Very, very—well, there was I think at one point a police car at another point, what looked like a communications vehicle. This is only a one-man patrol Jeep, you know, with the radios and stuff and supplies. I think that went by, but I was sitting in the room and it was one of the other volunteers. We took turns, maybe one-half hour to watch at the window, to watch for army vehicles coming down. Sight burners we call them.

Q. What is the first thing that you yourself personally observed or heard prior to the shoot out?

A. The shooting? Well, I was sitting there and the [798] next thing you know one of the volunteers says "There is something strange here. There is a car coming."

Q. You were sitting where?

A. I was sitting down in the room on one of the chairs. I was sitting with the weapon on my knee, like in this position.

Q. Which weapon did you have?

A. I am afraid I can't answer that.

MS. PIKE: Your Honor, I am going to object to that. I don't think it's relevant. Mr. Doherty has been convicted.

THE COURT: You went into the incident. You can't say that I am going to limit what questions he asks about the incident you went into. Overruled.

Q. You have to answer the question, Mr. Doherty.

A. I had the Hackler & Clarke.

Q. Please continue telling us what occurred.

A. As I say, I was sitting with the rifle on my knee when all of a sudden the car pulled up, I ran to-

wards the window, which was on the right-hand side of the room.

Q. This window faces out on to what?

A. Faces out on to the Antrim Road.

Q. Who is the volunteer who told you something seemed strange?

A. I think it was Volunteer Fusco. We were all [799] sort of—I am not talking about he was 10 or 12 yards away, we were all sitting near enough beside the window. He said something is up and I ran into the other room.

Q. I'm sorry, when you say all, you mean you, Fusco, Campbell?

A. Campbell, yes.

Q. McGee was where?

A. McGee was down the stairs.

Q. With the members of the family?

A. Yes. He was keeping them out of harms way.

Q. Making sure that they didn't escape and call the authorities?

A. No. It was to make sure that they were kept out of the road and making sure that they didn't wander onto the street or up the stairs. He just told them to sit down on the table, make a cup of tea or whatever you are going to do, and McGee just walked about the bottom of the stairs.

Q. Fusco's words, as you recall them, were something is strange?

A. Yes. He says there is something strange here. So I ran to the window in the other room and this is when—

Q. Which room were you in with Fusco?

A. It's the right-hand side room. I think it's the kitchen they called it. The kitchen room. I think there was a sink or something in the room.

[800] Q. There was an ironing board there?

A. Yes. Yes, that's the room. You have the photographs.

Q. You went into another room?

A. Yes.

Q. Which room did you go into?

A. I went into the room on the right-hand side going up the stairs coming from the stairs.

Q. You went to the window. Where did you look and what did you see?

A. I looked out and I seen the car. I think it was a Cortina, a blue Cortina or a dark Cortina. I am talking—bringing back to now, or then, it seemed to be a blue Cortina car. I think it was a Ford. I noticed that the numbers of these people were on their way out of the car.

Q. Where was the car?

A. The car was—let's see, just sitting in the window. The car was to my left in this vicinity, to my left. Not extremely to my left, just about at 11 o'clock.

Q. Mr. Doherty, let me show you what have been marked as Government's Exhibits 5 and 6 for identification.

MS. PIKE: Your Honor, might I see these before they are shown to the witness? I have not seen these before.

THE COURT: Let the witness see them first.

[801] A. Yes, These are photographs of the house in question from the outside of the building.

Q. Taken from the other side of Antrim Road than where the house was where you were?

A. Yes. One is taken from the wall and the other one is taken from the traffic lights, I think. Of course, as you can see, Mr. Block, the cars are missing—the car in question is missing.

THE COURT: That's a fair representation of the house itself?

THE WITNESS: Oh, it's a photograph taken from across the street and you can see the other photograph was taken from the right-hand side or the left-hand side looking at the house.

Q. Mr. Doherty, did I gather that in response to the Judge's question you said that both 5 and 6 for identification seemed to you to be fair and accurate representations of the exterior scene at Antrim Road where the shoot out occurred on the day in question?

A. Yes. Well, I know this is a photograph. The other one must have been taken way up the road.

THE COURT: The only question is is it an accurate representation.

THE WITNESS: It is from the left-hand side of the house.

[802] MR. BLOCK: Your Honor, I offer these in evidence.

THE COURT: Any objection?

MS. PIKE: No.

THE COURT: Received.

(Government's Exhibits 5 and 6 for identification were received in evidence)

Q. Do you have your pen with you, Mr. Doherty?

A. You have a pen in your hand.

Q. I don't think this will mark this.

A. My attorney has a red pen, a felt pen.

Q. Would you mark with a circle or a square, whatever, the window that you were looking out when you saw the car for the first time?

A. The window which I was looking out?

Q. Yes.

A. In a circle?

THE COURT: Mark it with a D.

A. A D.

A. To the best of my knowledge, this. Do you want me to mark the other one?

Q. On the second floor, right?

THE WITNESS: See, back in Ireland, your Honor, we call the first floor the second floor.

THE COURT: I know. You do the same thing in [803] England too.

THE WITNESS: Most of the jargon that we use—

THE COURT: It is one of the few things that the Irish and the English may agree on.

Q. Mr. Doherty, where was the automobile that you saw when you looked out the window?

A. When I looked out the window it was—

Q. This Cortina.

A. It was just to the left. I would say around this direction here, as far as my recollection is, because when I came out of the house—because when the gun battle had actually started and the SAS were firing back, of course I was keeping my head down and I was trying to get up the stairs, but the last time I looked out the window—when I came out of the building, I think the car was on its way to be moved or was moved, but I didn't actually see the car, so it was only for the split second when I was looking out of the window and the actual gun battle was taking place when I seen the car and I identified it as in a dark color. Of course, in a split second I thought it was a Cortina Ford.

Q. Could you write the word "car" at the spot at the curb where you think you saw the car?

A. Maybe in this direction. I'd say it would have been near enough to that position.

[804] Q. Why don't you draw a line between those two points.

A. Okay.

THE COURT: Who fired the first shots, do you recall?

THE WITNESS: Pardon me.

THE COURT: Did it come from your side or their side or what?

THE WITNESS: Well, I would say it came from the SAS, but it was a sort of an ongoing gun battle between us. You know, as soon as we looked at the car, shots were fired and we started to fire back.

Q. You saw this Cortina?

A. What I thought was a Cortina.

Q. What you thought was a Cortina. Did the automobile have some particular significance to you?

A. Particular significance? It was an unmarked car and for the fact that the men jumped out, the SAS men—

Q. Let's forget the men for a moment. I am asking you if the automobile that you saw when you looked out the window after you think it was Fusco said something looks strange, if that unmarked automobile which you thought was a blue Cortina, did that have any significance to you?

A. I can't really—

THE COURT: You mean the car itself, that it was [805] a Cortina?

MR. BLOCK: Let me rephrase the question. It's the question that's at fault.

Q. Did you make a mental connection in your mind from seeing that automobile from the kind of automobile it was without markings, where it was parked, that led you to conclude that—

A. That it was the attacking vehicle?

Q. That it was being used by security forces?

A. Yes. I think—of course, I am trying to recollect my memory. By looking out the window, I think one of the doors opened. Of course, the men were climbing out of the car and coming towards the house.

If you take the actual house itself, it has what is known as a garden—well, a garden here, a garden which had a hedge, so from the actual house to the street is, I don't know, 14 yards—18 feet or something, so when I looked out and seen the troops jumping out of the car, I noticed one with the machine gun and, of course, I noticed one with a sledge hammer and I noticed the orange arm band, all, of course, in a very split second or two or three seconds.

Q. You saw five people getting out of the car?

A. Yes.

Q. How many arm bands did you see?

[806] A. How many arm bands? Well, I didn't watch for everyone, that he has got an arm band, he has got one, he has got one. I noticed arm bands were on their arms.

Q. On three of the individuals getting out of the car?

A. Well, I seen at least maybe two, two or three, yes. Of course, you have got to take it, Mr. Block, this is in a maybe four or five second period. I didn't take a photograph of it, but to the best of my recollection they were wearing arm bands.

Of course, when you see one person with an arm band and he is in a certain society or whatever it is, you take it for granted that that [*sic*] the other persons had it.

Q. You made an assumption that if there was one arm band all the people in that car belonged together and they could each be wearing arm bands, is that what you are saying?

A. They all came out of the car together.

Q. Well—

A. Of course, they were going that fast, you know. Some of these guys, if you take the SAS, this is the cream of the British Army. They don't exactly walk out of the car. They are very fast, but I did notice that at least three or more had the identification.

Q. You said on direct examination that as soon as [807] they got out of the car they started to attack the house, is that right?

A. Yes. They started to come towards the house. Towards our vicinity, if you understand what I mean.

Q. You are saying that this crack undercover el[i]te British Army unit pulled up in their car right underneath your window so you could shoot at them?

A. Well, they—

Q. That's how they approached the scene by stealth?

A. Yes, they must have underestimated the Irish Republican Army. Again, the SAS is mostly used in covert operations, as I explained before, sitting on the

outside of IRA dumps, they wait on the IRA approaching the dump to pick out his weapon and they assassinate him.

Of course, when they got their information that morning about the house, they must have underestimated the fire power. I am not too sure. You will probably have to ask the SAS.

Q. Mr. Doherty, the judge asked you who fired the first shot.

A. I am afraid I don't know.

Q. You don't know, do you?

A. No. The shooting just started and I fired myself.

Q. What did you fire at?

[808] A. I fired at the—when I saw of the SAS men and the car.

Q. You shot at the men, not the car, is that right?

A. I shot at the men and the car. The car and the men came together. They were in the same vicinity. They were in the target area.

Q. Your purpose in shooting at them was what?

A. To inflict as much casualties as possible.

Q. And to prevent yourself and your other volunteers with you from being captured?

A. Well, of course, this was the SAS. They weren't exactly coming in to give us a subpoena. They were coming in on a kill mission.

THE COURT: They were coming in on a what?

THE WITNESS: On a kill mission, your Honor. See, the tactics of the SAS, this goes back to the Second World War. They were formed in the Second World War to fight against General Rommel. It's a behind the lines forces. It's the cream of the cream of the British Army. They go behind the lines, destroy railroads, oil refineries.

THE COURT: Like commandoes?

THE WITNESS: Yes, but they are more extreme than commandoes. I think to the American forces they would be maybe the Seals or Green Berets. The Seals

are the Navy el[i]te troops of the Navy, things like that.

[809] They go behind lines. They don't exactly take prisoners. As I say, they paratroop behind lines, and following after the war, the Colonial Wars in Palestine, Malaya, Kenya, Cyprus and such, they were used as counterinsurgency troops. Especially in Malaya. They were used as jungle troops, like the Green Berets.

And the urban wars, if you take like Cyprus, they were used more as assassination teams and whatnot. They are what we call the dirty tricks department of the British Armed Forces.

Q. That day, as soon as you saw a couple of people getting out, a couple of men getting out of the car and a couple of arm bands, you came to the instant conclusion that this was the SAS coming to kill you and your comrades, is that right?

A. Well, we came to the conclusion that they were SAS or MRF, which is the military reaction forces. This is another branch that's connected to the SAS. They are surveillance, but they take more covert action.

You also have—

Q. Mr. Doherty, you are not answering my questions.

A. I am sorry.

THE COURT: The answer, I take it, is yes to the question?

THE WITNESS: Yes. We thought they were SAS, [810] but we weren't sure because they weren't exactly carrying an SAS badge.

Q. Consequently you made the assumption that if it was the SAS they weren't coming there to capture you, they were coming the [*sic*] there to assassinate, to kill you?

A. Yes. We are soldiers and soldiers in a combat situation can react maybe far different than a civilian.

Q. This was your first active engagement since you had been released from prison the preceding several months?

A. Yes.

Q. You are not even sure that it was they who fired the first shot. You weren't going to wait for the first shot to be fired, isn't that so?

A. As I explained before, the actual getting out of car, the approach to the house, the type of machine guns they had, coming towards the house, of course we knew we were under attack, but I am talking about on a split second decision, when they were getting out of the car, they met us at the window and they gave a short bursts from one of their small caliber machine guns and we returned fire—I returned fire along with—

Q. Did that happen?

A. Pardon me?

Q. Did the men getting out of the car open fire first before you fired?

[811] A. Yes. Well, it took them maybe two or three seconds to get out of the car. They came towards the house, and coming towards the house all commandoes or elite troops, when they got there, as they were coming towards the house they set up a burst.

Well, this is another tactic of the SAS. It's what's called cover by fire. It's when you fire, of course the person is going to put his head down so you can move into your cover area. They shot a burst as they were getting out of the car, and as soon as they were getting out of the car we were up straightaway and fired within a second if not less.

THE COURT: Were they able to get to the house?

THE WITNESS: Yes, they did. One of the officers who didn't exactly get to the wall or behind the hedge was the captain, Westmacott. The other troops got to the wall, but we didn't know at the time until the court that they actually went to the wrong house. They went to the house next door. Then they knew where the fire was coming from, so the time we got down the stairs they were coming in the front door. This is when we heard the door being banged open. We stood back and fired through the door. They all got to the wall.

Q. Are you saying that you didn't see Captain Westmacott fall?

[812] A. I seen them all fall. They were all crouching and running, and of course when the shots are fired at you, you go for the nearest cover you can get, you are going to dive behind a car, into a hedge, into the river, wherever, so when the shooting started they were all running and darting, but I seemed to see one of the soldiers, I think it was on the left-hand side, was lying, but we were too caught up into the rest of the SAS also trying to get out.

Q. Mr. Doherty, how did you know that the five men were not other members of the Irish Republican Army, another active service unit?

A. Because we are in the active service unit and we come under the Belfast Brigade Command. The Belfast Brigade Command knew one unit was in a certain area, they wouldn't get another unit to attack this unit. It would be very counterproductive. We have a coordination within the movement.

Q. How did you know it was not some paramilitary gentleman from the Irish National Liberation Army?

A. Because the Irish National Liberation Army don't attack in this way.

Q. How do you know it wasn't some loyalist paramilitarist?

A. Because the loyalist paramilitaritsts don't attack in this fashion.

[813] Q. There always has to be a first time, doesn't there, Mr. Doherty?

A. There could be, but you have got to take on my experience at that specific moment. Five men jumping out of a car in civilian dress—

THE COURT: I take it [*sic*] is fair to say you don't know for sure who they were.

THE WITNESS: If somebody says your last 10,000 pounds, put it down on the bed, of course I wouldn't do it, but I am saying it could have been the MRF, which is

the British Army is broken up into all these small sections and, of course, if you take the SAS in general, most of the SAS—they are drawn from the regiments which I explained before, the Royal Grenadiers, the Scotch Guards, Wel[s]h Regiment and the cream of the cream of these regiments, they are taken out and put in the SAS, but when their actual job is over they go back into regiment, because when I cross-examined the SAS at my trial, I asked one, and he said yes, I am a member of the SAS, but I am attached to the Royal Wel[s]h regiment.

So, of course, it was an SAS tactic or a military tactic, the formation that they were coming at the house. It wasn't an IRA tactic or the INLA or the loyalist paramilitary group.

Q. Mr. Doherty, before you opened fire, did you [814] consult your colleagues about what their thoughts were on this matter or did you just act independently and individually?

A. Of course you act independently. I haven't the time to turn around to Volunteer Campbell and say permission to shoot. Of course, we are soldiers.

Of course, Mr. Block, if you were in the armed services yourself, the armed services are told to use their own discretion on an immediate crisis which is about to appear. You don't keep asking your subordinates "Can I pop me rifle over me shoulder or can I do something else."

THE COURT: I take it there wasn't time for a committee meeting.

THE WITNESS: No, no. Definitely not.

Q. You and your two colleagues, Campbell and Fusco, surrendered, correct?

A. Yes. We surrendered to the forces that surrounded the house.

Q. Before you surrendered, one of the three of you put up something in the nature of a white flag in the window?

A. Oh, yes.

Q. The purpose of doing that was what?

A. It was to show to the population, I think the members of the press, that we were surrendering.

[815] Q. You have already said more than once that you view it as your responsibility as a soldier in the Irish Republican Army to try to inflict the maximum number of casualties on the British forces, correct?

A. Yes.

Q. When you surrendered you hadn't yet run out of ammunition, had you?

A. Yes, you are right. We hadn't run out of ammunition.

Q. You had run out of ammunition?

A. No, we hadn't.

Q. You stopped shooting before the last round was expended?

A. Yes.

Q. Why did you not keep on shooting and try to take out as many of the members of the security force as possible?

A. Because the situation didn't allow for it.

Q. What do you mean by that, Mr. Doherty?

A. Well, as soon as the shooting stopped, as I said, we went down the stairs, we came back up the stairs, we tried to get out to the back window. We noticed that there was British troops at the back as well.

So the officer in charge assigned us to specific parts of the building waiting on the pending attack. We [816] waited and waited and the SAS didn't seem to want to come back in again, so we heard the sound of the tanks and Jeeps and the whole place was surrounded, so we took up stands—as a matter of fact, we were sitting waiting on grenades, the grenade guns with tear gas getting shot.

So the police came on the scene. The police asked to get in contact with the Irish Republican Army on the inside. The officer in command said okay, we will surrender.

But as far as what I am trying to say, why didn't we make a big shoot out, the situation was to surrender, because we see it that we are more—we are just as valuable on the inside of prison as I explained before.

Q. You were concerned that you would be killed?

A. Of course, too, yes.

Q. There was more of them than there were of you?

A. Well, there was more of them at the start of the gun battle as there was eight SAS officers knowing to the court and there was three of us. So we were outnumbered from the start.

We never surrendered until I think about an hour after the actual shooting, an hour or maybe one hour and ten minutes, I am not too sure, but it was pretty long.

Q. Isn't it correct that you and your colleagues [817] wanted to surrender to the police and not to the army?

A. No. It was actually the police who was on the bullhorn. It was on the horn that called in.

Q. Hadn't somebody from inside 371 Antrim Road asked for the police to be brought?

A. The police? No. A priest.

Q. Someone asked for a priest to be brought?

A. A priest and police sound alike. This is what I tried to explain to them. The police thought we were calling for the police and they asked us for surrender and we called out saying we are not surrendering until a priest arrives on the scene. This is to be a witness in case there was an assassination on the way out.

In case they turned around and said well, Mr. Doherty, Mr. Fusco and Mr. Campbell had guns in their pockets and were trying to get out, so as well as a surrender, the officer in command, Campbell, told us to put the guns on the outside of the window, so the guns was on the outside of the window so the press can see and the actual population.

We asked for a priest, but I think one of the soldiers or whoever was below was a Scotsman. This is a person from Scotland. Of course, the way they say priest is

priest, very quick in that, so we said a priest, get a priest, but the police was already on the scene. As a [818] matter of fact, the police was already calling on the bullhorn.

Q. In any event, the three of you surrendered?

A. Oh, yes.

Q. At some point you said you left the weapons up on the window ledge?

A. Yes.

Q. That was to show you didn't have any weapons when you were coming down?

A. Yes. This was to show we hadn't got any weapons. If we had been assassinated on the way down, if we had left the weapons inside the rooms and we had been assassinated, they could have put the weapons beside us and say they tried to make a shoot out, so by the weapons on the outside of the window, the actual flag to show the people we are actually surrendering, and this is why we asked for the police, just in case we were on the way down the stairs and we would get assassinated, this was it.

Q. When you came out of the building you saw the body of a soldier there, correct?

A. Yes. He was much to the left-hand side.

Q. What kind of clothes was he wearing?

A. Clothes I didn't notice.

Q. You didn't notice?

A. No. I think there was a blanket over him.

• • • • •

[REDIRECT EXAMINATION]

[850] BY MS. PIKE:

Q. Mr. Doherty, we had quite a few questions from Mr. Block about your juvenile adjudication when you were 12 years old. Would you tell us, please, what the disposition of that matter was?

A. Excuse me?

THE COURT: What was the outcome of your prosecution as a juvenile?

MS. PIKE: Thank you, your Honor.

THE WITNESS: I spent four weeks in a training school.

THE COURT: St. Patrick's School?

THE WITNESS: Yes. It is a sort of farm. It is situated in the west of Belfast. I spent four weeks there with the priests and nuns who run the place.

Q. Mr. Doherty, just to place you back to 371 Antrim Road, what if any contact did you have with the people who were being held in the apartment on the first floor after the shoot out occurred but before you left the house?

A. We had no contact at all.

Q. Thank you. If you would, you stated that the IRA policy is against taking what Mr. Block referred to as hostages. What is the basis for the IRA policy against taking hostages?

[851] A. We did not take hostages because civilians are not part of the war, plus we see ourselves as an army, and as explained in Document 37, the IRA has a military code of ethics. Of course, this contradicts the general British media that tries to say that we are terrorist thugs, Leninists, murderers. This is just a screen to the outside world so people won't fully understand what's going on in the north of Ireland.

People in the United States, if they went to Belfast and understood the situation, seeing the strife that was there and came back to the United States and tried to maybe do something about it through their congressmen or senators, would fully understand.

But the IRA, we recognize ourselves as an army. We recognize ourselves that we have some moral justification in the war. We have moral justification in the war.

Q. Finally, Mr. Doherty, I have one final question. What was your purpose in escaping from the Crumlin Road Jail on June 10, 1981?

A. The purpose of the escape, of course, we were prisoners of war, we escaped from prison. The sense of

the escape is to spread as many British troops as possible, tie them down on the ground. As a matter of fact, after our specific escape, I don't know, it was on the British news [852] and the Irish news that hundreds of troops had been drafted into the north, east, south and west of Belfast to search.

Also for publicity sake. It was to publicize to the rest of the world and to the rest of Ireland that prisoners were fighting back and the struggle was there and we were fighting back.

Also for the morale of the prisoners on the inside and the morale of the hunger strikers. As one of the hunger strikers who died three or four weeks later, a man called Joe McDonald—we got a letter from his wife thanking us for the escape and she says before Joe died he said he was going to his death happy that he knew men had fought back and had broke the British system.

MS. PIKE: Thank you, Mr. Doherty.

THE COURT: Anything further?

MR. BLOCK: No, your Honor.

THE COURT: You may step down, Mr. Doherty.

THE WITNESS: Thanks very much, your Honor.

(Witness excused)

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SUPREME COURT OF THE UNITED STATES

No. 90-925

IMMIGRATION and NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ORDER GRANTING CERTIORARI

Filed February 19, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

February 19, 1991

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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Attorney General is prohibited from considering the Nation's opposition to terrorism, and other foreign policy concerns, when he exercises his discretion to grant or deny asylum to an alien under Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. 1158(a).

2. Whether the Attorney General properly declined to reopen respondent's deportation proceedings to allow him to apply under Section 243(h) of the Act, 8 U.S.C. 1253(h), for withholding of deportation to the United Kingdom, on the ground that the existing record established that he would be ineligible for that relief under either of two statutory exclusions because he committed serious nonpolitical crimes in the United Kingdom and was actively involved in the Provisional Irish Republican Army, a terrorist organization.

3. Whether the Attorney General abused his discretion in concluding that respondent did not in any event identify changed circumstances or new and material evidence that warranted the reopening of his deportation proceedings to permit him to apply for asylum and withholding of deportation.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-925

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 908 F.2d 1108. The opinions of the Attorney General (Pet. App. 46a-91a, 116a-130a), the Board of Immigration Appeals (Pet. App. 92a-115a, 131a-133a, 134a-147a, 148a-155a), and the immigration judge (Pet. App. 156a-159a) are unreported.

JURISDICTION

The judgment of court of appeals was entered on June 29, 1990. Pet. App. 160a. A timely petition for rehearing was denied on September 13, 1990. Pet. App. 161a. The petition for a writ of certiorari was filed on December 11, 1990, and was granted on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, and implementing regulations are set forth at App., *infra*, 1a-8a.

STATEMENT

A. Respondent is a native of Northern Ireland, a citizen of the United Kingdom, and a member of the terrorist organization known as the Provisional Irish Republican Army (PIRA). Before illegally entering the United States in 1982, respondent had an extensive criminal record in Northern Ireland. In 1973, he was convicted of possessing a firearm, and in 1974 he was convicted of possessing 80 pounds of explosives. On May 2, 1980, five months after his release from prison, respondent and three other PIRA members drove in a highjacked van to a private house in North Belfast, while the driver was held captive. They seized the house, holding the family captive, and attacked a car full of British soldiers, killing one. Respondent was arrested and tried in Belfast. After the close of evidence but prior to verdict, respondent and seven others escaped from a maximum security prison armed with weapons smuggled into the prison. On June 12, 1981, respondent was convicted *in absentia* of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization. He was sentenced to life imprisonment. Pet. App. 2a, 46a-47a, 43a-44a, 84a-88a; J.A. 161-188.

B. After fleeing to the Republic of Ireland, respondent entered the United States under an alias in 1982 and was arrested in 1983. The INS immediately instituted deportation proceedings, and respondent applied for asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158. Pet. App. 3a; J.A. 5-18.[1]

[1] In August 1983, at the request of the United Kingdom, the United States sought a warrant under 18 U.S.C. 3184 authorizing extradition of respondent. On December 12, 1984, Judge Sprizzo of the Southern District of New York denied the application, holding that respondent's crimes of May 2, 1980, fell within the exception in the extradition treaty for offenses of a "political character." *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D. N.Y. 1984); see Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, art. V(1)(c)(i), 28 U.S.T. 230, T.I.A.S. No. 8468. An order denying extradition is not appealable, and the government's attempt to obtain collateral review of the order in a declaratory judgment action was unsuccessful. *United States* v. *Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), aff'd, 786 F.2d 491 (2d Cir. 1986). The deportation proceedings were stayed pending completion of the extradition and related proceedings.

At his deportation hearing in September 1986, respondent withdrew his application for asylum, waived his right to seek that relief, disavowed any intention to apply for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), and admitted that he was deportable on the ground that he had entered the United States without valid immigration documents, in violation of 8 U.S.C. 1251(a)(1) and 1182(a)(20). Pet. App. 49a-50a. Section 243(a) provides that an alien shall be deported to a country he designates, "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." 8 U.S.C. 1253(a). Respondent designated Ireland, but the INS objected on the ground that he might avoid punishment there, which would be "prejudicial to the interests of the United States" in combatting terrorism. The immigration judge nevertheless ordered respondent deported to Ireland, Pet. App. 156a-159a, and the Board of Immigration Appeals (BIA) affirmed. *Id.* at 148a-155a.[2]

[2] Four days after the immigration judge's decision, respondent filed a habeas corpus petition seeking immediate deportation to Ireland. The district court and court of appeals denied relief. *Doherty* v. *Meese*, 808 F.2d 938 (2d Cir. 1986). The court of appeals noted that respondent sought this relief because of a then-pending supplementary extradition treaty between the United States and the United Kingdom, which had been ratified by the Senate and was then pending before the British House of Commons. That treaty, which subsequently entered into effect on December 23, 1986, excluded such crimes as murder, serious unlawful detention, hostage taking, and firearms offenses from the "political offense" exception on which Judge Sprizzo had relied in declining to authorize extradition of respondent. 808 F.2d at 940; Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, as amended. See S. Exec. Rep. No. 17, 99th Cong., 2d Sess. (1986); see note 1, *supra*.

On June 9, 1988, Attorney General Meese reversed the BIA's decision and ordered respondent deported to the United Kingdom. Pet. App. 116a-130a. He concluded that deporting respondent to Ireland would be "prejudicial to the interests of the United States" within the meaning of Section 243(a) because it would conflict with the policy of the United States to ensure that individuals who commit acts of violence against democratic states are punished quickly and lawfully, would undermine the United Kingdom's "confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern," and "might well prejudice broader aspects of our bilateral relationship." Pet. App. 125a-127a

C. While the matter was pending before Attorney General Meese, respondent moved to designate a country other than Ireland and to reopen the proceedings so that he could apply for asylum and withholding of deportation. J.A. 55-66. As grounds for this motion, respondent relied solely on an Extradition Act that was adopted in Ireland in January 1987 (and became effective on December 1, 1987), J.A. 94-108, which he contended would result in his extradition to the United Kingdom were he deported to Ireland. C.A. App. 354-373.

The BIA refused to allow respondent to withdraw his designation of Ireland. But by a 3-2 vote, the BIA granted his motion to reopen, albeit on a different ground: although the INS had taken the position from the outset that respondent should be deported to the United Kingdom rather than Ireland, the majority believed that respondent "could not have been expected to anticipate that he would not be deported to his country of choice" and that his failure to file for asylum at an earlier date was "excusable" for this reason. Pet. App. 99a; see *id.* at 92a-100a. The dissenting BIA members would have denied reopening as a matter of discretion in light of the "extremely serious nature of the crimes which [respondent] has admitted committing and for which he has been convicted" in Northern Ireland, respondent's status as a "terrorist and a member of a terrorist organization" that "has used explosives on a number of occasions in

which innocent civilians were killed or injured," respondent's conviction for transporting such explosives for the PIRA, and the actions of respondent and his accomplices in taking civilians hostage and exposing them to a gun battle. *Id.* at 105a-106a.

D. On June 30, 1989, Attorney General Thornburgh disapproved the BIA's order and denied respondent's motion to reopen his deportation proceedings. Pet. App. 46a-91a.

1. The Attorney General first concluded that respondent had not identified changed circumstances that warranted reopening, thereby rejecting the BIA's notion that Attorney General Meese's denial of respondent's request to be deported to Ireland satisfied that requirement. Pet. App. 58a-59a, 65a-67a.[3] He reasoned that the Attorney General's invocation of his express statutory authority to reject a deportee's designation "certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interests should prevail." *Id.* at 58a-59a; see also *id.* at 66a-67a. Moreover, in his view, "[t]he ultimate decision in an administrative process cannot itself constitute 'new' evidence to justify reopening"; otherwise, "there could never be finality in the process." *Id.* at 67a.

The Attorney General also rejected respondent's contention (which the BIA had not addressed) that the 1987 Irish Extradition Act warranted reopening. Pet. App. 59a, 67a-74a. He found that event "neither sudden nor

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[3] The Attorney General found it unnecessary to decide whether respondent had established a prima facie case of eligibility for asylum or withholding of deportation, noting that he had discretion to deny reopening even had respondent done so. Pet. App. 64a-65a n.21 (citing *INS* v. *Abudu*, 485 U.S. 94 (1988)).

unforeseeable," since the Act gave effect to the European Convention on the Suppression of Terrorism (Jan. 27, 1977), 15 I.L.M. 1272, 16 I.L.M. 233, and Ireland had formally committed itself to that Convention in November 1985[4] and signed it in February 1986, "more than six months *before* respondent withdrew his applications for asylum and for withholding of deportation." Pet. App. 67a-68a. Those events were widely publicized, and the Attorney General concluded that "[r]espondent, having expressly based his designation on a counseled understanding of Irish extradition laws, is properly chargeable with knowledge of Ireland's signing of the European Convention." *Id.* at 68a. The Attorney General further ruled that the Extradition Act did not warrant reopening because (i) it did not alter the provisions of United States immigration law that govern respondent's deportation and application for asylum and withholding of deportation (*id.* at 69a-70a); (ii) the Act did not work a substantial change in Irish law, since respondent was subject to extradition from Ireland to the United Kingdom even prior to the new Extradition Act (a point respondent repeatedly made when he sought to be deported to Ireland), and since the new Act bars extradition if sought for purposes of persecution (*id.* at 70a-72a); and (iii) any change in Irish law was irrelevant because respondent was to be deported to the United Kingdom, not Ireland (*id.* at 74a).

Finally, the Attorney General found that the evidence of conditions in Northern Ireland that respondent submitted with his motion to reopen did not satisfy the newly-discovered-evidence standard for reopening, because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence that was presented." Pet. App. 75a; see *id.* at 74a-78a.[5]

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[4] See Anglo-Irish Agreement, Nov. 15, 1985, Ireland-United Kingdom, 24 I.L.M. 1579, 1581 (1985).

[5] Respondent had submitted a report by Amnesty International (C.A. App. 452-455, 511-558), a book on which that report drew (*id.* at 559-709), and an affidavit of his mother, accompanied by newspaper articles (*id.* at 407-450; see J.A. 78-89.). The BIA, over two dissents (see Pet. App. 101a-102a), found this evidence material and sufficient (if unrebutted) to make out a "prima facie claim of a well-founded fear of persecution." *Id.* at 99a. That is the standard for establishing the status of a "refugee" under Section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), which in turn is necessary for an alien to be eligible for the discretionary relief of asylum under Section 208 of the Act. Contrary to the apparent view of the court of appeals (Pet. App. 12a), however, the BIA did not make any finding as to whether that evidence established a prima facie case of eligibility under the higher standard for mandatory withholding deportation under Section 243(h)(1)—namely, that the alien's life or freedom "would be threatened" in the foreign country.

2. Next, the Attorney General found that respondent's waiver of asylum and withholding of deportation in September 1986 was "part of a calculated plan to [try to] ensure immediate deportation to Ireland before the United Kingdom ratified its [supplementary extradition] treaty with the United States, which would have allowed [respondent] to be extradited directly to the United Kingdom." Pet. App. 60a; see note 2, *supra*. In the Attorney General's judgment, respondent had assumed the risk that his tactical choice might not succeed, and "the interests in the integrity of the administrative process and finality of decision" required that his waiver be given effect. *Id.* at 79a, 81a.

3. The Attorney General also denied reopening on the independent ground that respondent would not be granted asylum or withholding of deportation in any event. Pet. App. 60a-61a, 81a-91a. The Attorney General decided, in his discretion, that he would not grant respondent asylum because: (i) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment"; (ii) "it is in the foreign policy interests of this country that respondent be deported to the United Kingdom"; (iii) "respondent knowingly and intentionally waived his claim to asylum"; and (iv) respondent's past actions "suggest that he is not deserving of equitable relief." *Id.* at 82a.

The Attorney General found respondent ineligible for withholding of deportation under two statutory exclusions. First, he determined that there are "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside of the United States." 8 U.S.C. 1253(h)(2)(C). That determination was based both on the crimes respondent indisputably committed and on probable cause to believe that he committed other violent crimes against innocent civilians as an active member of the PIRA, which the United States officially regards as a terrorist organization and has been found to have killed or attempted to kill those who politically oppose its activities. Pet. App. 83a-88a & n.50, 89a. The Attorney General also found respondent ineligible because, through his active role in the PIRA—serving as an officer, gathering ammunition, distributing arms, and training PIRA members—he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion," 8 U.S.C. 1253(h)(2)(A). Pet App. 89a-91a.

E. The court of appeals sustained Attorney General Meese's order directing respondent's deportation to the United Kingdom, but it set aside Attorney General Thornburgh's order denying respondent's motion to reopen the proceedings. Pet. App. 1a-45a.

1. In sustaining Attorney General Meese's order, Pet. App. 7a-9a, the court held that Section 243(a) confers "broad discretion" to decide what is prejudicial to national interests, which "requires an essentially political determination" that is "essentially unreviewable" by a court. Pet. App. 8a. The court accepted Attorney General Meese's explanation that "deporting [respondent] to the Republic of Ireland, indeed anywhere but the United Kingdom, would harm our relationship with the United Kingdom and would contradict our policy of punishing violence against democratic nations." *Id.* at 9a. In the court's view, "[j]udgments of this nature are surely within the scope of the attorney general's discretion under § 243(a)," and it was "not permitted to second-guess them." *Ibid.*

2. By contrast, the court, over Judge Lumbard's dissent, set aside Attorney General Thornburgh's order denying respondent's motion to reopen, holding, *inter alia*, that the Attorney General could not consider these same anti-terrorism and foreign policy factors when passing on respondent's asylum request. Pet. App. 9a-29a. Although the Court stated in *INS* v. *Abudu*, 485 U.S. 94 (1988), that reopening may be denied on "at least" three grounds, thereby leaving open others as well, the court of appeals treated the grounds identified in *Abudu* as exclusive and found that they were not present here. Pet. App. 11a-12a, 16a.

a. The court first noted that Attorney General Thornburgh did not base his decision on a finding that respondent failed to establish a prima facie case of eligibility for substantive relief. See note 3, *supra*. It therefore assumed for purposes of the appeal that respondent had satisfied that burden. Pet. App. 12a.

b. The court next held that the Irish Extradition Act and Attorney General Meese's decision ordering respondent deported to the United Kingdom rather than Ireland satisfied respondent's burden of producing "previously unavailable, material evidence" or a "reasonable explanation" for why he had not theretofore requested asylum or withholding of deportation. Pet. App. 12a-15a. The court ruled that Attorney General Thornburgh should not have looked to whether those events were foreseeable when respondent waived his right to seek asylum or withholding of deportation, because, in its view, an alien should not have to consider anything beyond the facts and law in existence at the time he makes such a tactical decision. *Id.* at 13a.[6] In addition, the court faulted the

[6] The court rejected the Attorney General's conclusion that respondent assumed the risk that his designation of Ireland might be disapproved or that Ireland might amend its extradition laws, and that respondent therefore should be held to his prior waiver of his right to apply for asylum and withholding of deportation. Pet. App. 27a-28a. The court did not dispute the Attorney General's finding that these were "deliberate tactical decisions" by respondent. *Id.* at 27a. But it found his concern for the "integrity of the

Attorney General for taking a different view of the facts than the BIA, and it deferred to the BIA's judgment, rather than that of the Attorney General, as to when reopening is warranted, on the theory that the BIA "repeatedly deals with motions to reopen, and has, no doubt, developed a body of informed experience that helps it distinguish meritorious motions from those lacking in merit." *Id.* at 14a.

c. The court of appeals further found that Attorney General Thornburgh erred in deciding that respondent would not ultimately obtain asylum or withholding of deportation. Pet. App. 15a-27a. It held that the Attorney General could not base his denial of asylum on the United States' policy that those who commit acts of violence against a democratic state should receive prompt and lawful punishment, or on other foreign policy interests. *Id.* at 17a-27a. The court acknowledged that these same factors were "clearly relevant" to Attorney General Meese's denial of respondent's request to be deported to Ireland, *id.* at 26a-27a, and that the Attorney General has "broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests." *Id.* at 18a. But it found these to be "improper factors" in the asylum context. *Ibid.* The court pointed to no preclusion of such factors in the text of Section 208, which, it recognized, Pet. App. 17a-18a, broadly provides that an alien who satisfies the threshold requirement of being a refugee "may" be granted asylum "in the discretion of the Attorney General." Instead, in holding that the Attorney General has a "more limited role" and only "limited discretion" in asylum cases, the court relied on what it regarded as the "spirit" of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102), drawn from its legislative history, Pet. App. 19a-25a, and it deferred once again to the BIA's past practice in asylum cases, rather than the Attorney General's considered judgment. *Id.* at 24a-25a.

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administrative process" to be "unconvincing" and insufficient to justify denial of reopening. *Id.* at 28a.

The court similarly held that the Attorney General could not deny reopening based on the two statutory exclusions from eligibility for withholding of deportation. Pet. App. 15a-17a. It believed that the Attorney General's power to deny reopening for reasons other than a lack of new evidence or the alien's failure to establish a prima facie case of eligibility for the underlying relief is limited to cases in which the ultimate grant of relief is discretionary, and that he therefore "simply has no discretion" to deny reopening based on a finding of ineligibility for mandatory withholding of deportation. *Id.* at 16a.

3. Judge Lumbard dissented from the reversal of Attorney General Thornburgh's decision. Pet. App. 29a-45a. He stressed that reopening is "committed to the discretion of the Attorney General" and "'disfavored in deportation proceedings,'" *id.* at 31a-33a (quoting *Abudu*, 485 U.S. at 107), and that "[w]hen the Attorney General decides, after a careful review of the voluminous record, that a drawn-out case such as this one no longer merits attention, we are in no position to contradict that judgment." Pet. App. 33a. Judge Lumbard also criticized the majority for according more deference to the BIA than to the Attorney General, because "[m]atters which concern asylum and deportation are primarily matters of foreign policy and political judgment," and "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a. And Judge Lumbard found the majority too rigid in applying *Abudu*, because the reasons identified in *Abudu* for denying reopening were "clearly not meant to be exhaustive." *Id.* at 34a-35a.

Judge Lumbard also disagreed with the majority's specific rulings. First, he disputed its holdings that the Attorney General may not take anti-terrorism or foreign policy concerns into account in exercising his discretion on asylum requests, and that his authority to deny asylum to eligible aliens "is limited to a narrow class of cases." Pet. App. 37a; see *id.* at 35a-38a. He noted that "[w]hile Congress has established rules for determining who is

eligible for asylum, it has created no rules for determining who among those eligible for asylum should receive that relief," instead committing that determination to "the discretion of the Attorney General." *Ibid.* (quoting 8 U.S.C. 1158(a)). In Judge Lumbard's view, this is "the broadest language possible," and, if anything, it affords the Attorney General wider latitude than he has to reject an alien's designation of the country of deportation under Section 243(a), under which the majority allowed consideration of anti-terrorism and foreign policy concerns. Pet. App. 36a-37a. Judge Lumbard also found it significant that "Congress specifically rejected making asylum mandatory upon the appropriate showing," which demonstrates that "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." *Id.* at 36a.

Second, Judge Lumbard rejected the notion that either Attorney General Meese's decision or the Irish Extradition Act warranted reopening, Pet. App. 38a-41a, finding respondent's position analogous to that of a criminal defendant who cannot withdraw a guilty plea "merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* at 40a (quoting *Brady* v. *United States*, 397 U.S. 742, 757 (1970)). He also believed that the Extradition Act was not a "new" development warranting reopening, in light of the Attorney General's conclusion that respondent "was extraditable from the Republic of Ireland to the United Kingdom even prior to December 1, 1987 on the basis of long-standing provisions of Irish law." *Id.* at 40a-41a.

Finally, Judge Lumbard would have sustained the Attorney General's determination that respondent is excluded from eligibility for withholding of deportation. Pet. App. 42a-45a. In particular, Judge Lumbard reasoned that "[s]ince the record is replete with [respondent's] admissions of actions constituting violations of § 243(h)(2), and since the Attorney General's determination that [respondent] failed the test in subsection (C)

is a model of a reasoned decision based on the record, * * * he properly denied the motion to reopen to the extent it was for the purpose of applying for withholding." *Id.* at 42a-43a.

SUMMARY OF ARGUMENT

The decision whether to reopen deportation proceedings to allow an alien to apply for asylum or withholding of deportation is committed to the Attorney General's discretion. *INS* v. *Abudu*, 485 U.S. 94 (1988). He did not abuse that discretion here.

I. A. The court of appeals erred in holding that the Attorney General has only limited discretion—and may not consider the Nation's opposition to terrorism and foreign policy concerns—when deciding whether to grant asylum. Section 208(a) of the Immigration and Nationality Act provides that an alien "may be granted asylum in the discretion of the Attorney General" if the Attorney General determines that he is a "refugee." Although "refugee" status establishes *eligibility* for asylum, nothing in Section 208(a) precludes consideration of foreign policy concerns or otherwise limits the Attorney General's discretion to decide who among eligible aliens will be granted that relief. This conclusion is reinforced by Section 207 of the Act, which confers unqualified discretion on the Attorney General to admit refugees from outside the United States and expressly allows consideration of "foreign policy interests." It also is reinforced by other provisions of the Act that confer comparably unfettered discretion and that the court of appeals acknowledged allow consideration of foreign policy concerns.

The limitations the court below placed on the Attorney General's discretion cannot be reconciled with *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Stevic*, 467 U.S. 407 (1984), where the Court stressed that no alien has a right to asylum and contrasted Section 208(a) to Section 243(h), which mandates withholding of deportation to a country where the alien would be threatened with persecution. The Court explained that Section 243(h) implements the *nonrefoulement* require-

ment of the Convention Relating to the Status of Refugees, whereas Section 208(a) corresponds to a wholly "precatory" provision of the Convention concerning admission of refugees. The court of appeals' notion that foreign policy concerns are "improper" in asylum cases also conflicts with *Abudu*, which sustained a denial of reopening to seek asylum and accorded special deference to the INS because it "must exercise especially sensitive political functions that implicate questions of foreign relations." 485 U.S. at 110.

The legislative history of the Refugee Act of 1980 strongly supports the Attorney General's decision, because it contains numerous statements confirming the close nexus between asylum and foreign policy, and contains no suggestion of an intent to limit the unfettered discretion the Attorney General previously exercised in deciding whether to grant asylum pursuant to his parole power under Section 212(d)(5) of the Act. The court of appeals found it significant that Congress prescribed eligibility for asylum through a "politically neutral" definition of the term "refugee," and thereby broadened the category of aliens eligible for entry from outside the United States. That revision, however, had no effect on the Attorney General's unqualified discretion to decide who among eligible aliens would be granted asylum or admission, and indeed Congress specifically rejected a proposal to make the granting of asylum mandatory.

Finally, the court of appeals should have deferred to the Attorney General's formal interpretation of Section 208(a), not inferences drawn from the Board of Immigration Appeals' practice. If limitations are to be placed on the United States' sovereign power to deny asylum, they should be the product of diplomacy and reciprocity among Nations, not judicially fashioned standards.

B. The court of appeals erred in holding that the Attorney General had no discretion to deny reopening based on a finding that respondent is excluded from eligibility for withholding of deportation. The existing record incorporated respondent's testimony at his extradition hearing, in which he admitted the conduct on which the Attorney General based his decision. No further hearing was necessary. The Attorney General's denial of reopening in these circumstances is subject to judicial review under an abuse-of-discretion standard.

The Attorney General properly found respondent ineligible for withholding of deportation under Section 243(h)(2)(C), based on his determination that there are "serious reasons for considering" that respondent committed a "serious nonpolitical crime" in Northern Ireland. That ruling is entitled to special deference, because the text and background of the Act establish that the determination is for the Attorney General to make and that his *characterization* of the crime is critical. Here, the Attorney General's determination rested both on the May 2, 1980, incident in Belfast and respondent's active participation in the Provisional Irish Republican Army, which is officially regarded by the United States as a terrorist organization and was found to have killed or attempted to kill its political opponents and caused violence against innocent civilians. Any "political" element of those offenses was overcome by their atrocious nature and lack of proportion and close causal nexus to their alleged political objective. For similar reasons, the Attorney General properly found respondent ineligible under Section 243(h)(2)(A) because he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion."

II. The Attorney General did not abuse his discretion in deciding that respondent had in any event failed to identify new evidence or changed circumstances that warranted reopening so that he could file a belated application for asylum or withholding of deportation. Respondent relied solely on an Extradition Act adopted in Ireland in 1987, which, he contended, would result in his extradition to the United Kingdom if he was deported to Ireland. But any change in *Irish* law was irrelevant to his claims for asylum and withholding of deportation to the *United Kingdom*. Moreover, the Attorney General found that the 1987 Act did not work a material change in Irish law, and that Ireland had publicly committed itself to the revi-

sion well before respondent waived his right to apply for asylum and withholding of deportation in 1986.

ARGUMENT

THE ATTORNEY GENERAL PROPERLY DENIED RESPONDENT'S MOTION TO REOPEN HIS DEPORTATION PROCEEDINGS

At his deportation hearing in September 1986, respondent withdrew his asylum application and waived his right to seek asylum or withholding of deportation, hoping to bring about his immediate deportation to Ireland before a new extradition treaty between the United States and the United Kingdom came into force. See page 7 and note 2, *supra*. After failing in that attempt to avoid punishment for the murder and related crimes he committed in the United Kingdom, respondent repudiated his tactical choice and sought to reopen the proceedings to seek the special relief (asylum and withholding of deportation) that he previously had disavowed. The Attorney General properly refused to countenance such manipulation of the administrative process.

This Court has repeatedly held that the decision whether to reopen deportation proceedings under applicable regulations is committed to the discretion of the Attorney General. *INS* v. *Abudu*, 485 U.S. 94, 105-106 (1988); *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981).[7]

[7] 8 C.F.R. 3.2 provides that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing," and that no motion to reopen to seek discretionary relief shall be granted "unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing." See also 8 C.F.R. 103.5, 242.22. Because Section 3.2 is "framed negatively" and "does not affirmatively require the Board to reopen the proceedings under any particular condition," it confers discretion on the BIA to deny a motion to reopen even where the conditions it specifies are satisfied. *Abudu*, 485 U.S. at 105-106 (quoting *Jong Ha Wang*, 450 U.S. at 144 n.5). Similarly, 8 C.F.R. 208.11 provides that a motion to reopen

Courts may not order reopening of any administrative proceeding except "in the most extraordinary circumstances," *Abudu*, 485 U.S. at 107 n.11 (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974)), upon "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). And "the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context," because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations." *Abudu*, 485 U.S. at 110. The court of appeals failed to respect these settled principles when it ordered the Attorney General to reopen respondent's deportation proceedings, since his denial of reopening plainly was not an "unreasoned or arbitrary exercise of discretion." *Rios-Pineda*, 471 U.S. at 451.

Indeed, the Attorney General's decision not to reopen the proceedings was fully justified on several independent grounds. First, where the underlying substantive relief the alien seeks in his motion to reopen is itself discretionary, the Attorney General may decide that even if all other requirements for reopening might be satisfied, relief should be denied as a discretionary matter. *Abudu*, 485 U.S. at 105. Accordingly, as we explain in Point I(A), *infra*, insofar as respondent sought to apply for asylum, the Attorney General properly denied his motion to reopen on the ground that foreign policy concerns (including the Nation's opposition to terrorism) and re-

to request asylum "must reasonably explain the failure to request asylum" at an earlier date and that if the alien fails to do so, the claim shall be considered frivolous, absent evidence to the contrary. The regulation does not state that reopening must be granted if the movant does furnish a reasonable explanation. Thus, 8 C.F.R. 208.11 (which the Court in *Abudu* construed to apply to requests for withholding of deportation as well as asylum) likewise confers discretion to deny a motion to reopen even where the conditions it specifies are satisfied. 485 U.S. at 99 n.3, 104-105, 106-107 & n.10.

spondent's criminal background would not warrant an exercise of discretion in his favor. In a related vein, as we explain in Point I(B), *infra*, the Attorney General properly denied the motion to reopen insofar as respondent sought to apply for withholding of deportation, because although that relief is not discretionary, the Attorney General reasonably determined, based on respondent's own admissions in the record, that he would be ineligible under either of two separate statutory exclusions.

Second, as we explain in Point II, *infra*, the Attorney General properly denied respondent's motion to reopen for an independently sufficient reason identified in *Abudu*, 485 U.S. at 105: even if (contrary to our submission in Point I) respondent had made the sort of showing that would have warranted the discretionary granting of asylum or mandatory withholding of deportation if he had sought such relief in a timely manner, the Attorney General did not abuse his discretion in finding that respondent had failed to identify any new evidence or changed circumstances that justified respondent's *belated* attempt to raise those issues in a motion to reopen.

I. THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETION IN DENYING RESPONDENT'S MOTION TO REOPEN ON THE GROUND THAT RESPONDENT WOULD NOT IN ANY EVENT BE GRANTED ASYLUM OR WITHHOLDING OF DEPORTATION

A. The Attorney General Properly Considered The Nation's Opposition To Terrorism And Other Foreign Policy Concerns In Deciding That Respondent Is Not Deserving Of The Special Humanitarian Relief Of Asylum

The Attorney General denied respondent's motion to reopen insofar as he sought to apply for asylum on the ground, *inter alia*, that he would not, in the end, grant that discretionary relief to respondent. The Attorney General cited a number of reasons: (i) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment"; (ii) "the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom"; (iii) "respondent knowingly and intentionally waived his claim to asylum"; and (iv) respondent's "membership in and assistance of the PIRA in its acts of presecution, and the nature and number of his criminal acts in general, * * * suggest that he is not deserving of equitable relief." Pet. App. 82a. The mere recitation of these reasons is sufficient to demonstrate that the Attorney General acted properly—and manifestly did not abuse his discretion—in deciding that respondent should not be granted the special humanitarian relief of asylum.

The court of appeals nonetheless overturned the Attorney General's determination. It held that in deciding whether to grant asylum to an alien, the Attorney General has only a "limited role" and "limited discretion," Pet. App. 25a, and cannot consider "factors such as the government's geopolitical and foreign policy interests"—including "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Id.* at 21a, 26a. It instead held that the Attorney General's discretion may only be exercised to promote "administrative fairness and efficiency" and prevent procedural "abuses" in the asylum system. *Id.* at 24a-25a. The court clearly erred in imposing these unprecedented limitations on the Attorney General's discretion. The support of democratic governments and the rule of law are central to this Nation's history. It is inconceivable that Congress intended to require the Attorney General to ignore these principles when deciding whether to grant an alien "so great a privilege as asylum in the United States." *Id.* at 38a n.3 (Lumbard, J., dissenting).

1. *The Text Of Section 208(a) And Related Provisions Of The Act Does Not Support The Limitations The Court Of Appeals Placed On The Attorney General's Discretion*

a. Nothing in the text of Section 208(a) of the Act, 8 U.S.C. 1158(a), supports the limitations the court of appeals imposed. Section 208(a) provides that an alien "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." Although "refugee" status is clearly a necessary condition for an alien to be granted asylum, the text makes equally clear that such status does not entitle the alien to relief; that is a separate matter, expressly committed to "the discretion of the Attorney General." Put another way, although Section 208(a) incorporates standards to guide the Attorney General's determination of whether an alien is a "refugee" for these purposes (see 8 U.S.C. 1101(a)(42)(A)), and thereby limits his discretion to *grant* asylum, it does not limit the Attorney General's discretion to *deny* asylum. Compare *Bowen* v. *Yuckert*, 482 U.S. 137, 148 (1987). In particular, there is no suggestion that the Attorney General may not consider the Nation's foreign policy concerns when passing on an asylum application.

b. The closely related provisions of Section 207 of the Act, 8 U.S.C. 1157, confirm that the Attorney General has broad discretion in this area and is not prohibited from taking foreign policy considerations into account. That Section establishes procedures for the admission of refugees from outside the United States. Section 207(a)(2) provides that, for years after 1982, the number of refugees admitted "shall be * * * such * * * as the President determines * * * is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. 1157(a)(2). Section 207(c) then provides that subject to these numerical limitations, "the Attorney General may, in the Attorney General's discretion * * *, admit any refugee who is not firmly resettled in any foreign country," if he "is determined to be of special humanitarian concern to the United States." 8 U.S.C. 1157(c). These standards plainly are broad enough to encompass consideration of foreign policy concerns, both in general and in individual cases. But if there could be any doubt on this score, it is dispelled by the provisions for consultation regarding the number of refugees to be admitted annually. See § 207(d) and (e), 8 U.S.C. 1157(d) and (e). In order to facilitate that consultation, the President must furnish Congress specified information, including "[a]n analysis of the impact of the participation of the United States in the resettlement of such refugees on the *foreign policy interests* of the United States." § 207(e)(6), 8 U.S.C. 1157(e)(6) (emphasis added).

These provisions establish that if respondent were applying for relief as a refugee *outside* the United States, the Attorney General would not abuse his discretion if he denied that relief because—in light of respondent's membership in a terrorist organization, his criminal conduct in Northern Ireland, and the United Kingdom's strong interest in his prompt return to serve his sentence—respondent is not an alien "of special humanitarian concern to the United States" and his admission would not further the "national interest" and would have an adverse impact on the "foreign policy interests of the United States." There is no basis in the text of Section 208(a) for concluding that the Attorney General is prohibited from taking these same considerations into account when deciding whether to grant the parallel (and equally discretionary) relief of asylum to an alien who has managed to enter the United States illegally.[8]

c. The court of appeals' narrow view of the Attorney General's authority in asylum matters likewise cannot be

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[8] Cf. Sections 212(a)(3)(B) and 241(a)(4)(B) of the Act (as added by the Immigration Act of 1990, Pub. L. No. 101-649, §§ 601(a) and 602(a), 104 Stat. 5069-5070, 5081) (providing for exclusion and deportation of aliens who have "engaged in terrorist activity"); Pub. L. No. 100-204, § 901(b), 101 Stat. 1400 (same); 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706.

squared with still other provisions of the Immigration and Nationality Act. Even the court of appeals acknowledged that those other provisions permit the Attorney General to consider foreign policy concerns, yet it offered no persuasive basis for distinguishing Section 208(a) from this established statutory pattern.

First, the court of appeals' holding that Attorney General Thornburgh's discretionary denial of asylum rested on improper factors is especially anomalous in light of its ruling that Attorney General Meese properly relied on the same anti-terrorism and foreign policy concerns in rejecting respondent's designation of Ireland as the country of deportation under Section 243(a). Pet. App. 7a-9a. As Judge Lumbard explained, *id.* at 36a-37a, a comparison of Sections 208(a) and 243(a) does not suggest such dramatically different outcomes, because both commit the ultimate decision to the "discretion" of the Attorney General if a specified condition is satisfied.

Second, the court erred in believing that Section 208(a) stands in "significant contrast" to Section 244(a) of the Act, 8 U.S.C. 1254(a), which provides that the Attorney General "may, in his discretion," suspend the deportation of an alien who satisfies certain eligibility requirements. Pet. App. 21a-22a. In *Jay* v. *Boyd*, 351 U.S. 345 (1956), the Court described the Attorney General's discretion under Section 244 as "unfettered," explaining (351 U.S. at 353-354):

> Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute * * * does not restrict the considerations which may be relied upon * * *. [A grant of relief] is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace.

This description applies equally here, because Section 208(a) directly parallels Section 244(a): it prescribes standards of eligibility (by incorporating the definition of "refugee"), but does not provide standards for determining who among qualified applicants should receive the ultimate relief or restrict the considerations that may be relied upon by the Attorney General. Because Congress drafted Section 208(a) in this parallel manner, it presumably intended the Attorney General's discretion to be comparably unfettered. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 624 (1991). Indeed, that was this Court's understanding in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). There, the Court described the discretion conferred by Section 208(a) as "typical" under the Act, and as a comparable example, it cited *INS* v. *Jong Ha Wang*, *supra*, which involved suspension of deportation under Section 244.

2. *This Court's Decisions In* Cardoza-Fonseca, Stevic, *And* Abudu *Refute The Court Of Appeals' Construction Of Section 208(a)*

Not only do the limitations imposed by the court of appeals find no basis in the text of Section 208(a); they also cannot be reconciled with this Court's decisions discussing the text and purposes of Section 208(a).

a. The Court stressed in *Cardoza-Fonseca*, 480 U.S. at 428 n.5, that "[t]he Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee," and that "a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General*.'" The Court similarly stressed in *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984), that "[m]eeting the definition of 'refugee' * * * does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a)." As the emphasis supplied by the Court in both cases suggests, these statements were integral to the Court's explanation of the place of Section 208(a) in the statutory scheme.

Specifically, in *Cardoza-Fonseca*, the Court contrasted Section 208(a) to Section 243(h) of the Act, which

provides for withholding of deportation of a refugee to a particular country where his "life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1253(h)(1). Section 243(h) implements the *nonrefoulement* requirements in Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150,[9] to which the United States is bound as a result of its accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268. Withholding of deportation is mandatory, but it is "country specific" and does not bar deportation to a third country. *Cardoza-Fonseca*, 480 U.S. at 428 n.6, 429 & n.7, 440-441; *Stevic*, 467 U.S. at 416.

Asylum, the Court observed in *Cardoza-Fonseca*, "is a greater form of relief" than withholding of deportation, because "the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to numerical limitations and the applicable regulations." 480 U.S. at 428-429 n.6. But in contrast to Section 243(h), Section 208(a) establishes a "discretionary mechanism" that merely "gives the Attorney General the *authority* to grant the broader relief of asylum to refugees." 480 U.S. at 441. This follows, the Court explained, from the fact that Section 208(a) does not implement the mandatory *nonrefoulement* provisions of Article 33 of the Convention, but "instead corresponds to Article 34"; although the latter Article does

[9] Article 33.1 provides: "No contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Certain aliens are ineligible for this protection by virtue of exclusions from the definition of "refugee" in Article 1(F), 19 U.S.T. 6263-6264. See page 40, *infra*.

not actually address asylum as such,[10] it urges the contracting States to "facilitate the assimilation and naturalization of refugees" and, "[l]ike § 208(a)," only provides for a precatory, or discretionary * * * benefit" for persons found to be refugees. 480 U.S. at 441.[11] Because this Court has already construed Section 208(a) to do no more than establish a "discretionary mechanism" by which the Executive Branch may take measures that correspond to a provision of the Convention that is itself only "precatory" and "discretionary," it should not be construed to impose substantive, judicially enforceable limitations on the Attorney General's discretion to deny asylum to a particular alien.

b. This conclusion is reinforced by the Court's rejection of the government's argument in *Cardoza-Fonseca* that "it is anomalous for § 208(a), which affords greater benefits than § 243(h), * * * to have a less stringent standard of eligibility" ("well-founded fear," rather than "would be threatened"). This argument, the Court explained, failed to take account of the fact that an alien who satisfies the lesser standard "does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion,

[10] See Office of the U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 7 para. 25 (1988) ("the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol") [hereinafter *U.N. High Commissioner's Handbook*].

[11] There is no right to asylum under international law or practice. See G. Goodwin-Gill, *The Refugee in International Law* 103-104, 121-122 (1983); Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 Emory J. Int'l L. 43, 46 (1990). For example, Article 14(1) of the Universal Declaration of Human Rights, U.N. Doc. A/811 (1948), states only that "everyone has the right to *seek* and to enjoy in other countries asylum from persecution" (emphasis added). Proposals to substitute "to be granted" for "to enjoy" were rejected, because "[c]ontemporary opinion held that to grant asylum to refugees within its territory was the sovereign right of every state, while the corresponding duty was that of respect for that asylum by all other states." See Goodwin-Gill, *supra*, at 104.

chooses to grant it." 480 U.S. at 443. If anything was anomalous, the Court continued, it was the government's argument "to restrict its discretion to a narrow class of aliens." *Id.* at 444. But the Court responded by again emphasizing that "although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum." *Id.* at 444-445.

The court of appeals' notion that the Attorney General has only a "limited role" and "limited discretion" in asylum cases is incompatible with the foregoing description of Section 208(a) in every respect. Under the court of appeals' view, a refugee *would* "have a right to remain in the United States" unless the basis for the Attorney General's denial of asylum fell within the court of appeals' "limited" (yet undefined) category of permissible grounds, which specifically excludes the Nation's opposition to terrorism and other foreign policy factors; Section 208(a) therefore *would* "restrict [the government's] discretion to a narrow class of aliens"; and with respect to aliens falling outside that class, Congress would *not* have authorized the Attorney General "to determine which, if any, eligible refugees should be denied asylum." 480 U.S. at 444-445. The result would be to reintroduce the very anomaly the Court eliminated in *Cardoza-Fonseca*, by affording many refugees a right to obtain the broader relief of asylum under a standard of eligibility less stringent than that governing withholding of deportation.

c. The limitations the court of appeals placed on the Attorney General's discretion also conflict with other decisions of this Court recognizing that asylum policies, and immigration policies generally, are inextricably interwoven with the Nation's foreign policy interests. In *Abudu*, which likewise concerned the denial of reopening in the asylum context, the Court held that the reasons for deference to agency decisions apply with particular force under the immigration laws, because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations." 485 U.S. at 110.

Abudu is but the latest of this Court's decisions recognizing that "any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952), and that " 'the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' " *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)); accord *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101-102 n.21 (1976); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). Consistent with *Abudu* and its antecedents, other courts of appeals, in contrast to the court below, have made clear that foreign policy concerns are properly associated with asylum decisions.[12] Thus, the Second Circuit's holding that the Attorney General must "insulate" his discretionary asylum determinations from the foreign policy context in which they arise, Pet. App. 19a, represents a radical departure from established practice and precedent under the Immigration and Nationality Act.

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[12] See *Alvarez-Flores*, v. *INS*, 909 F.2d 1, 4 n.1 (1st Cir. 1990) ("connection of asylum and deportation to issues of foreign policy may counsel special deference to INS decisions"); *M.A.* v. *INS*, 899 F.2d 304, 313-314 (4th Cir. 1990) (en banc) (deferring to INS application of Section 208(a) because "numerous Supreme Court decisions recognize the intimate connection between immigration decisions and foreign policy"); *Kashani* v. *Nelson*, 793 F.2d 818, 827-828 (7th Cir.) ("District Director's decision whether to grant an asylum request involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the politcal branches of the government"), cert. denied, 479 U.S. 1006 (1986).

3. *The Legislative History Of Section 208(a) Strongly Supports The Attorney General's Broad Discretion To Consider Anti-Terrorism And Foreign Policy Concerns In Asylum Cases*

In fashioning limitations on the Attorney General's discretion that appear nowhere in the text of Section 208(a), the court of appeals relied entirely on what is regard as the "spirit" of the Refugee Act of 1980, Pet. App. 25a, based on inferences it drew from the Act's legislative history. See *id.* at 20a-21a, 23a-24a. But as this Court has said with specific reference to the Refugee Act, there is a "strong presumption that Congress expresses its intent through the language it chooses," and the plain import of that language (here, its grant of unqualified discretion to the Attorney General) can be overcome only by finding a "clearly expressed legislative intention" to the contrary. *Cardoza-Fonseca*, 480 U.S. at 432 n.12. That standard is not met here even under the court of appeals' own reading of the legislative history, which the court found to contain "some ambiguity" on the issue. Pet. App. 24a. In any event, the court of appeals seriously misunderstood the background of the Refugee Act of 1980, which in fact strongly supports the Attorney General's construction.

Congress enacted Section 208(a) in order to "establish[] for the first time a provision in Federal law specifically relating to asylum." *Stevic*, 467 U.S. at 426 n.20 (quoting H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979)). Prior to 1980, asylum was available to persons in the United States only under regulations issued pursuant to the Attorney General's parole authority under Section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), and his general authority under Section 103, 8 U.S.C. 1103, to administer the Act. *Stevic*, 467 U.S. at 426 n.20; *Cardoza-Fonseca*, 480 U.S. at 427 & n.4, 433 & n.14, 435 n.17. Then, as now, the parole provision of the Act authorized the Attorney General, "in his discretion," to admit aliens "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."

The court of appeals acknowledged that parole was the "primary vehicle" for granting asylum prior to 1980, and that parole was "wholly discretionary" with the Attorney General, thereby allowing him to consider the Nation's foreign policy interests. Pet. App. 18a-19a; *id.* at 21a (Attorney General had "unlimited discretion" prior to 1980); see *Jean* v. *Nelson*, 472 U.S. 846, 855 (1985). But the court believed that the Refugee Act greatly circumscribed the Attorney General's discretion and prevented the "government's political and foreign policy interests"—which it termed "improper factors"—from "influencing" his asylum decisions. Pet. App. 18a, 26a. There is no basis for that conclusion in the text of Section 208(a): like Section 212(d)(5), it commits the granting of relief to the "discretion" of the Attorney General, without qualification. Nor is there any suggestion in the legislative history that Congress intended to narrow the scope of the Attorney General's discretion under Section 208(a), as compared with that he previously exercised under Section 212(d)(5). To the contrary, the Senate Report states that "[t]he substantive standard is not changed." See S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979) (quoted in *Cardoza-Fonseca*, 480 U.S. at 435 n.16).[13]

The court of appeals found it significant that eligibility for asylum is established, through the definition of the term "refugee," in "politically neutral terms." Pet. App. 21a. The court ignored the fact that Congress did not enact into law any standards to control the Attorney General's exercise of his discretion to decide who, among the eligible applicants, will actually be granted asylum. Furthermore, the legislative history discussed in the materials cited by the court of appeals did not even involve Section

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[13] Accord *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71-72 (1979) (testimony of David Martin, State Dep't Legal Adviser's Office) [hereinafter *1979 House Foreign Affairs Hearings*].

208(a).[14] Rather, it concerned Congress's removal of the prior ideological and geographical restrictions on eligibility for conditional entry of aliens from *outside* the United States under former Section 203(a)(7) of the Act, see 8 U.S.C. 1153(a)(7)(A)(i) (1976), which could be granted only to aliens from Communist countries or the Middle East. In the Refugee Act, Congress replaced Section 203(a)(7) with Section 207, which broadly provides for admission of "refugees" from outside the United States, subject to flexible numerical limitations, and permits the Attorney General, in his "discretion," to admit such a refugee. See pages 20-21, *supra*.[15]

As under Section 208(a), the fact that Congress, by its definition of the term "refugee," removed the ideological and geographical restrictions on the aliens who are *eligible* for the exercise of the Attorney General's discretion under Section 207 does not support the court of appeals' far different and more sweeping proposition that Congress imposed strict limitations on the authority of the Attorney General to decide who among the eligible refugees will be admitted—and, in particular, that Congress precluded all consideration of anti-terrorism and other foreign policy concerns. As we have explained (see page 21, *supra*), that proposition cannot be squared with the text of Section 207 itself, which specifically identifies the "foreign policy interests of the United States" as a

[14] See Pet. App. 21a (citing *Stevic*, 467 U.S. at 425-427; S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); and Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 36 (1981)).

[15] Section 207, as added in 1980, also was intended to largely supplant the Attorney General's invocation of his parole authority to admit aliens who were not covered by the special conditional entry provisions under the prior Section 203(a)(7) for aliens from Communist countries or the Middle East. See 8 U.S.C. 1182(d)(5)(B). The parole power had been used to admit refugees from Hungary after the 1956 uprising, to admit more than 600,000 persons from Cuba since 1965, and to admit refugees from Indochina in the mid-1970s. See H.R. Rep. No. 608, *supra*, at 3-5; S. Rep. No. 256, *supra*, at 19; H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20-21 (1980).

relevant consideration in the admission of refugees. 8 U.S.C. 1157(e)(6).

Furthermore, the court of appeals' gloss on Section 208(a) cannot be squared with repeated references in the legislative history to the past practice and continued propriety of taking foreign policy considerations into account in the Nation's treatment of refugees. For example, the Chairman of the House Committee on Foreign Affairs stated that "the determination of the numbers and kinds of refugees to be admitted to the United States are issues involving U.S. foreign policy considerations," H.R. Rep. No. 608, *supra*, at 8,[16] and the Senate Report recites the requirement that the impact on "U.S. foreign policy interests" be considered in the consultation procedure regarding the admission of refugees. S. Rep. No. 256, *supra*, at 7; see also *id.* at 6 (refugees may be admitted "to fulfill foreign policy interests"). Similar views were expressed by the Attorney General, the State Department's Coordinator for Refugee Affairs, individual Members of Congress, and witnesses representing private organizations.[17]

[16] See also 126 Cong. Rec. 4503 (1980) (remarks of Rep. Zablocki) ("The conference report in my view successfully balances the foreign policy and domestic aspects of the U.S. refugee program. * * * U.S. involvement in refugee activities is first and foremost a matter of foreign policy.").

[17] See, *e.g.*, *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 24-25, 34 (1979) (Attorney General Bell) ("I operate on the theory that this is almost like a foreign policy matter, refugees. It usually has something to do with, or is rooted in, foreign policy. * * * When I first became Attorney General, different people would call on me and ask me to admit refugees. I said I can't be operating on an ad hoc basis, because this is foreign policy."); *The Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1, 37 (1979) (Sen. Kennedy) (refugees "touch at the heart of America's foreign policy," and although humanitarian concerns should be most important in refugee programs, "there are national policy factors as well"); *id.* at 9 (Refugee Coordinator Clark) ("refugee programs are an important element in our foreign

Finally, the restrictions created by the court of appeals ignore the fact that Congress specifically rejected the Senate proposal to make the granting of asylum mandatory upon an appropriate showing of persecution, and instead adopted the House provision committing that decision to the Attorney General's discretion, without any statutory qualifications. See *Cardoza-Fonseca*, 480 U.S. at 441-442. Thus, as Judge Lumbard observed, "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." Pet. App. 36a.

4. *The Court Of Appeals Should Have Deferred To The Attorney General's Reasonable Interpretation Of Section 208(a)*

If there were any remaining doubt about the legitimacy of the factors the Attorney General considered, the court of appeals should have deferred to what is, at the very least, a reasonable construction of Section 208(a) by the Attorney General, the official charged with administering the Act. See *Cardoza-Fonseca*, 480 U.S. at 445-446 & n.29; *PBGC* v. *LTV, Corp.*, 110 S. Ct. 2668, 2676-2677 (1990). Far from doing so, however, the court below expressly deferred to inferences it drew from prior decisions of the *BIA* (which did not involve the question presented here). Pet. App. 24a-25a. This error, which infects other aspects of the court of appeals' opinion as well,[18] stands the principle of deference on its head, be-

policy"); *1979 House Foreign Affairs Hearings* 50 (Refugee Coordinator Clark) ("refugee problems unfortunately have become a permanent part of the world in which we must fashion our foreign policy"); *id.* at 84 (representative of Lawyers Committee for Civil Rights Under Law) (although humanitarian concerns should "predominate" in admitting refugees, "it is a foreign policy issue and a foreign policy problem"); 125 Cong. Rec. 23,238 (1979) (Sen. Javits) ("it is very clear that this is a matter distinctly, very heavily, of foreign relations").

[18] See also Pet. App. 14a (faulting the Attorney General for taking a different view of the facts than the BIA and for deferring to the BIA, rather than the Attorney General, regarding the circumstances that warrant reopening); *id.* at 28a (criticizing the

cause as Judge Lumbard observed, "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a; cf. *Martin* v. *OSHRC*, 111 S. Ct. 1171 (1991).

The reasons for deferring to the Attorney General's construction are especially compelling here, because the court of appeals' contrary construction would fundamentally distort the asylum process. It would allow the Attorney General to deny asylum for lesser reasons of "administrative fairness and efficiency," Pet. App. 24a, but not for far weightier reasons of national security or foreign relations. And it would undermine the fairness of the Nation's immigration laws (and the appearance of such fairness) by conferring special humanitarian relief on terrorists and convicted criminals who enter the United States unlawfully, while thousands of refugees and others seeking to enter the United States lawfully must wait their turn abroad. Furthermore, if the United States may not refuse asylum to aliens who have committed acts of terrorism against other nations, the credibility of this Nation's efforts to combat terrorism will be substantially undermined, and other nations may respond by extending asylum to Americans who commit terrorist acts here.

Finally, the effect of the court of appeals' newly minted limitations is to confer a correlative right on a refugee to receive asylum whenever the grounds the Attorney General wishes to invoke are not among those the courts would find acceptable. That curious result would depart from international law and practice, under which a refugee does *not* have a right to be admitted to and remain in a particular country. See page 25 and note 11, *supra*. If such limitations are to be imposed on the sovereign power of the United States (through the Executive Branch) to deny asylum, they should be the product of negotiations, mutual undertakings, and reciprocity among Nations—and of a considered decision by the political

Attorney General's invocation of his authority to review the BIA's decisions in this case).

Branches of this Nation in that process—not judicially fashioned standards.[19]

B. The Attorney General Properly Concluded On The Uncontradicted Record That Respondent Would Be Ineligible For Withholding Of Deportation Under Either Of Two Statutory Exclusions From That Relief

1. *The Attorney General May Deny Reopening Where The Existing Record Shows That The Alien Falls Within A Statutory Exclusion From Eligibility For Withholding Of Deportation*

The Attorney General also properly declined to reopen the proceedings to the extent respondent sought to apply for withholding of deportation to the United Kingdom, because he determined that even if respondent were able to show that he satisfied the basic requirements in Section 243(h)(1), he would be excluded from eligibility. Section 243(h)(1) provides that the Attorney General shall not deport an alien to a country if the "alien's life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion" in that country. 8 U.S.C. 1253(h)(1). This prohibition "shall not apply," however, if the Attorney General determines that any of four grounds set forth in Section 243(h)(2) are present. In light of respondent's past criminal conduct and involvement with the PIRA, the Attorney General reasonably determined that respondent is excluded from eligibility on two such grounds: (1) there are "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside the United States prior to [his] arrival * * * in the United States," 8 U.S.C. 1253(h)(2)(C); and (2) respondent "assisted or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion," 8 U.S.C. 1253(h)(2)(A). See Pet. App. 83a-91a.

[19] The court of appeals also faulted the Attorney General for citing respondent's prior waiver of asylum as a factor supporting the discretionary denial of respondent's motion to reopen the proceedings to permit him to apply for asylum. Pet. App. 26a. But even if the court of appeals were correct that the waiver is not sufficient in itself to support denial of reopening (see *id.* at 27a-28a), an alien's affirmative waiver of asylum at an earlier stage in the proceedings (as distinguished from a mere failure to apply for that relief) is at minimum a relevant factor for the Attorney General to consider in deciding, in his discretion, whether to reopen the proceedings to permit a belated application.

The court of appeals did not disagree with the Attorney General's interpretation or application of the relevant statutory provisions; it did not reach those questions because it concluded that the Attorney General could not deny withholding of deportation in this case without a hearing. Pet. App. 15a-17a. Specifically, the court held that where an alien establishes a prima facie case of entitlement and introduces previously unavailable, material evidence, "the attorney general simply has no discretion" to deny reopening on the ground that the alien would be ineligible for relief, because in doing so he would be proceeding "without the benefit of a record." *Id.* at 16a-17a.

The court of appeals' reasoning is flawed in two critical respects. First, as we explain in Point II(B), *infra*, respondent did *not* produce previously unavailable, material evidence of an increased likelihood of persecution in the United Kingdom between September 1986 and December 1987 that might have supported a favorable exercise of discretion to reopen the proceedings in order to permit respondent to apply for withholding of deportation.[20] Second, the Attorney General did *not* find respondent ineligible for withholding of deportation "without the benefit of a record." The transcript of respondent's testimony at the district court hearing in the extradition proceedings (see note 2, *supra*), in which he admitted the essential bases for the Attorney General's finding of ineligibility, was part of the record in these proceedings. See J.A. 109-190; C.A. App. 712-943.

[20] Moreover, neither the Attorney General nor the BIA found that respondent had made a prima facie showing of eligibility for withholding of deportation. See note 5, *supra*.

Where, as here, the record already developed in the case establishes a reasonable basis for concluding that the motion is not meritorious—whether because the alien does not satisfy a basic eligibility requirement or, as here, because an exclusion renders him ineligible—it is entirely appropriate for the Attorney General to deny reopening. See *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"). The court of appeals read *Abudu* to foreclose that approach here: it believed that the Attorney General's power to deny reopening based on factors other than the movant's failure to establish a prima facie case or the lack of new evidence is limited to cases in which the ultimate relief sought is discretionary. Pet. App. 16a. This Court did not so hold in *Abudu;* it stated only that there are "at least" three independent grounds on which the BIA may deny a motion to reopen, 485 U.S. at 104, thereby contemplating the possible existence of others as well. This case involves another such ground: a determination by the Attorney General that the undisputed facts in the existing record render the alien ineligible for relief.

In fact, this case is closely analogous to the situation, cited in *Abudu*, in which a motion to reopen may be denied if the alien fails to establish a prima facie case of eligibility for the underlying relief, because here the Attorney General determined that respondent likewise fell outside the class of aliens to whom Section 243(h) affords relief. 485 U.S. at 104. In each instance, there is no genuine issue of *material* fact concerning a dispositive basis for rejecting the claim, and reopening therefore may be denied without further proceedings, including an evidentiary hearing. Cf. Fed. R. Civ. P. 56(e).[21] Furthermore, quite aside from the language

[21] The analogy to summary judgment procedures would remain apt even if the statutory exclusions from eligibility for withholding of deportation under Section 243(h)(2) were regarded as in the nature of "affirmative defenses" on which the government bears the burden of proof. Summary judgment may be entered in favor of the defendant on an affirmative defense. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 348 (1971); 6 (Pt. 2) J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.17[4] (2d ed. 1988).

of the Court's opinion in *Abudu*, nothing in the regulations governing motions to reopen—under which *Abudu* and its predecessors arose—prohibited the Attorney General from denying respondent's motion to reopen, once he determined that the undisputed facts in the existing record rendered respondent ineligible for withholding of deportation. In this context as in all others, the regulations commit the decision whether to grant the motion to reopen to the discretion of the BIA (or the Attorney General). See pages 16-17, *supra.*

The Attorney General did not abuse his discretion here in denying relief without a hearing. That course was especially warranted with respect to the determination under Section 243(h)(2)(C) that there are "serious reasons for considering" that respondent has committed a serious nonpolitical crime outside the United States. Such a determination is essentially a finding of probable cause, *McMullen* v. *INS*, 788 F.2d 591, 598 n.2, 599 (9th Cir. 1986); cf. *U.N. High Commissioner's Handbook* 35 (para. 149), which is typically made without an adversarial hearing. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119-125 (1975).

2. *The Attorney General Did Not Abuse His Discretion In Concluding That The Evidence In The Record Showed That Respondent Would Be Excluded From Eligibility For Withholding Of Deportation*

Because the court of appeals held that a hearing is necessary, it did not decide whether, if the Attorney General could resolve the issue on the *existing* record, he permissibly determined that respondent is statutorily excluded from eligibility for withholding of deportation. In our view, however, the Court should not remand to the court of appeals to address that question. These pro-

tracted proceedings should be brought to a close now. The correctness of the Attorney General's determination is properly before the Court and, as we shall now explain, it is amply supported in law and fact. Alternatively, the Court might choose not to review the Attorney General's determination on the merits, and instead sustain his denial of the motion to reopen on the independent ground that (as we explain in Point II, *infra*) the only changed circumstance on which respondent relied to justify reopening the proceedings—the enactment of a new Extradition Act in *Ireland* in December 1987—was totally immaterial to any claim by respondent for withholding of his deportation to the *United Kingdom*.

a. If the Court chooses to review the Attorney General's determination that respondent is excluded from eligibility for withholding of deportation, a threshold question arises concerning the proper standard of judicial review. In *Abudu*, the Court held that the abuse-of-discretion standard applies to review of the BIA's denial of reopening on the ground that the alien (1) did not identify new evidence or changed circumstances, or (2) should be denied underlying relief that is itself discretionary. 485 U.S. at 104-111. The Court did not decide whether the same standard applies where reopening was denied on the ground that the alien did not make a prima facie showing of eligibility for the underlying relief. *Id.* at 104. In our view, the courts should apply the abuse-of-discretion standard in reviewing all aspects of a decision denying a motion to reopen.

Application of a unitary standard of review is strongly supported by this Court's subsequent decisions in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990), which held that the abuse-of-discretion standard governs appellate review of both legal and factual aspects of district court determinations under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1), that the position of the United States was not substantially justified, and district court orders imposing sanctions under Fed. R. Civ. P.

11. In both contexts, the Court reasoned that there is a close relationship between questions of fact and law; the district court is more familiar with the underlying proceedings and the parties' litigating posture; and interests of judicial economy warrant deference to the district court's determinations. 487 U.S. at 559-563; 110 S. Ct. at 2459-2461.

Similar considerations support a unitary abuse-of-discretion standard of review in the present setting. First, agency officials who preside over deportation proceedings are in a better position than reviewing courts to evaluate the relationship of a motion to reopen to the issues involved in the principal proceedings. Second, reopening of deportation proceedings is governed by regulations that commit the decision to the agency's discretion in all circumstances. Third, a decision denying reopening may be based on several overlapping grounds, and it would be cumbersome for a reviewing court to carve it up into separate pieces for purposes of the standard of review. Fourth, the "strong public interest in bringing litigation to a close * * * promptly," upon which the Court relied in *Abudu* in prescribing a deferential standard of review for certain denials of reopening, 485 U.S. at 107, applies to such denials across the board. And fifth, the reasons for giving special deference to agency decisions on motions to reopen apply with even greater force in the INS context, because sensitive political and foreign relations interests are often implicated. 485 U.S. at 110. There are no grounds under the foregoing principles for overturning the Attorney General's considered judgment that respondent is excluded from eligibility for withholding of deportation.

b. The Attorney General first found respondent ineligible under Section 243(h)(2)(C). Deference to the Attorney General's judgment is especially warranted under that provision, because, as we have explained, it excludes an alien from eligibility if "the Attorney General determines" that "there are serious reasons for considering" that he has committed a serious nonpolitical crime. This formulation (as opposed to simply that the

alien has committed a nonpolitical crime) emphasizes both that the determination is for the Attorney General to make and that his *characterization* of the conduct is critical. See *Pierce* v. *Underwood*, 487 U.S. at 559; cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

The background of Section 243(h) reinforces this conclusion. The Conference Report on the Refugee Act of 1980 states that Section 243 "is based directly upon the language of the Protocol [Relating to the Status of Refugees] and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, *supra*, at 20.[22] The exclusion in paragraph (C), at issue here, is drawn directly from a virtually identical exclusion in Article 1(F)(b) of the Convention, 19 U.S.T. 6264.

As the Attorney General noted, what constitutes a serious nonpolitical crime "is not susceptible of rigid definition." Pet. App. 83a. The *U.N. High Commissioner's Handbook* states (at 35 (para. 149)) that the competence to decide whether the exclusions from eligibility for *nonrefoulement* apply rests with the contracting State in whose territory the alien seeks recognition of his refugee status, and it stresses that that State need not have firm proof, only "serious reasons for considering," that a ground for exclusion exists. "In practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is evidently one in which political considerations will be involved." Goodwin-Gill, *supra*, at 35 (quoted by the Attorney General, Pet. App. 83a-84a). The origins of Section 243(h)(2)(C) thus heighten the degree of deference owed to the Attorney General's interpretation and application of Section 243(h) under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). See *Cardoza-Fonseca*, 480 U.S. at 448 ("[t]here is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication," in which "the

[22] Actually, as we explain in the text, Section 243(h) is based on provisions of the Convention, not the Protocol.

courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program"). The Attorney General's decision here rests on a reasonable interpretation of Section 243(h)(2)(C).

Although neither Section 243 nor the Convention defines a "nonpolitical crime," the *U.N. High Commissioner's Handbook* (at 36 (para. 152)) identifies several relevant factors: (1) whether the crime was "committed out of genuine political motives and not merely for personal reasons or gains"; (2) whether there is "a close and direct causal link between the crime committed and its alleged political purpose and object"; (3) whether the political element of the offense "outweigh[s] its common-law character"; (4) whether "the acts committed are grossly out of proportion to the alleged objective"; and (5) whether "it involves acts of an atrocious nature."[24] See also *McMullen* v. *INS*, 788 F.2d 591, 595-597 (9th Cir. 1986) (considering similar factors); Goodwin-Gill, *supra*, at 61. In light of these factors, there is no basis for overturning the Attorney General's determination that he had "serious reasons for considering" that respondent's conduct constituted serious nonpolitical crimes. Indeed, as Judge Lumbard observed, "the Attorney General's determination that [respondent] failed the test in subsection (C) is a model of a reasoned decision based on the record." Pet. App. 43a.

Respondent is a member of the PIRA, which is officially classified by the United States Government as a terrorist organization. U.S. Dep't of State, *Patterns of Global Terrorism: 1988*, at 33-34, 74-75 (1989); Pet. App. 84a-85a & n.45; see *McMullen*, 788 F.2d at 597 ("the PIRA is unquestionably a 'terrorist' organization"); *Adams* v. *Baker*, 909 F.2d 643, 648-649 (1st Cir. 1990). As the Attorney General pointed out, the "PIRA's

[23] The *Handbook* does not have the force of law and does not bind the Attorney General in interpreting the provisions of the Act. But the *Handbook* furnishes guidance in construing the Protocol, and therefore may properly inform the interpretation of the Act. *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

random acts of violence against the ordinary citizens of Northern Ireland and elsewhere" are "exhaustively documented" in the record in *McMullen*. Pet. App. 86a n.46 (quoting 788 F.2d at 598). There, the BIA found that "the PIRA is a clandestine, terrorist organization" that has engaged in "attacks on both government civilian institutions and military installations, random violence against innocent civilian populations through indiscriminate bombing campaigns, [and] the murder or maiming of targeted individuals for political reasons based on their public opposition to the PIRA," and that the PIRA's "operations have been funded, in part, through the commission of thousands of armed robberies." Pet. App. 86a n.46 (quoting *In re McMullen*, Interim Dec. 2967 (BIA May 25, 1984), slip op. 4-5).

Traditional principles of conspiracy law, see *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946), are sufficient to associate respondent with these actions of the PIRA for purposes of determining if there are "serious grounds for considering" that he committed serious nonpolitical crimes. Pet. App. 85a-86a & n.46; see *McMullen*, 788 F.2d at 599. Respondent was an officer of the PIRA, and he admitted that he was responsible for distributing arms, gathering ammunition and training other PIRA members. Pet. App. 89a; J.A. 147, 153. He also acknowledged that the PIRA had planted explosives that resulted in the death of civilians (although he insisted that the PIRA's policy was to attempt to avoid civilian casualties), J.A. 139-140, and he was convicted in 1974 for transporting 80 pounds of explosives for the PIRA. Pet. App. 46a-47a; J.A. 156-157. The Attorney General also properly found "serious reasons for considering" that respondent had committed a serious nonpolitical crime specifically based on the events of May 2, 1980, for which respondent was convicted of murder and related offenses. Those events included hijacking a van and holding its driver captive, seizing a family-occupied house in a residential neighborhood, attacking a car full of British soldiers, and killing a British officer. *Id.* at 88a.

Finally, the Attorney General had a firm basis for concluding that the common-law character of respondent's offenses outweighed any "political" element they might have. Respondent's crimes were not converted into "political" crimes simply because they might have been politically motivated. As the provisions of the *U.N. High Commissioner's Handbook* quoted above make clear, political motivation is only one factor to be considered.[24] Here, other factors predominated. Respondent's actions not only involved acts of an atrocious nature, but they also were out of proportion to the political objective alleged and did not have a close and direct causal link to their alleged political object. Compare *Ornelas* v. *Ruiz*, 161 U.S. 502, 511 (1896) (magistrate justified in not applying political offense exception in extradition treaty, "in view of the character of the foray, the mode

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[24] Consistent with this view, courts and commentators have concluded that a distinction should be drawn between contemporary political action, which may include protected political offenses, and terrorism, even if the terrorism was politically motivated. *McMullen*, 788 F.2d at 597; *Eain* v. *Wilkes*, 641 F.2d 504, 519 (7th Cir.), cert. denied, 454 U.S. 894 (1981); Thompson, *The Evolution of the Political Offense Exception in an Age of Modern Political Violence*, 9 Yale J. World Pub. Ord. 315, 338-341 (1983); but cf. *Quinn* v. *Robinson*, 783 F.2d 776, 804-805 (9th Cir.), cert. denied, 479 U.S. 882 (1986).

In *Eain*, the court, construing the extradition treaty between the United States and Israel, rejected the argument that a member of the Palestine Liberation Organization should not be extradited to Israel on charges of setting a bomb in a busy market area of an Israeli city, killing two young boys and injuring thirty other people, because any crimes were "political offenses" and therefore not grounds for extradition under the treaty. The court noted that "[m]odern international terrorism is a phenomenon apart from the world's experience," and held that Eain's political motivation was insufficient to render his actions political offenses, because terrorist activity seeks "the destruction of a political system by undermining the social foundation of the government." 641 F.2d at 519-521. If the rule were otherwise, the court explained, "nothing would prevent an influx of terrorists seeking a safe haven in America" and seeking to "avoid having to answer to anyone anywhere for their crimes." *Id.* at 520.

of attack, the persons killed or captured, and the kind of property taken or destroyed").

This case closely resembles *McMullen*, where the Ninth Circuit held that the activities of a PIRA member were "serious nonpolitical crimes" within the meaning of Section 243(h)(2)(C). McMullen had participated in the bombing of barracks and other PIRA activities. The court rejected his argument that he was not excluded under Section 243(h)(2)(C) because the only specific evidence linked him to actions against military installations, not civilians. 788 F.2d at 599. The court acknowledged a distinction between "terrorist acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens," *id.* at 597, but found that the PIRA's terrorist activities were not limited to military targets. Moreover, it concluded that "the PIRA's random acts of violence against ordinary citizens of Northern Ireland and elsewhere * * * are not sufficiently linked to their political objective and, by virtue of their primary targets, [are] so barbarous, atrocious, and disproportionate to their political objectives that they constitute 'serious nonpolitical crimes' for purposes of section 243(h)(2)(C) and the Convention." *Id.* at 598. Indeed, the court concluded that such activities "were directed solely at bringing about social chaos, with the eventual demise of the State intended only as an indirect result." 788 F.2d at 597. McMullen was therefore excluded from eligibility because of his "willing and material involvement in a terrorist organization that carried out acts of violence against civilians, his assistance in training members of that organization and procuring arms shipments." *Id.* at 599. So too here.[25]

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[25] Although terrorist activities solely affecting the military might, in some circumstances, also constitute "serious nonpolitical crimes," see Pet. App. 124a, Attorney General Thornburgh did not decide that question here. *Id.* at 88a n.48a.

As we explained in our reply brief (at 7-8) at the petition stage, Judge Sprizzo's decision denying the application for a warrant to extradite respondent to the United Kingdom because, in his view, respondent's conduct of May 2, 1980, fell within the treaty exception

c. Respondent's active role in the PIRA also was sufficient to support the Attorney General's determination that he is excluded from eligibility for withholding of deportation because he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion." 8 U.S.C. 1253(h)(2)(A). As noted above (see page 42, *supra*), the BIA concluded in *McMullen*, and the Attorney General reached the same conclusion in this case, that the PIRA is an organization that has killed or attempted to kill those who politically oppose its activities. According to his own testimony in the extradition proceedings, respondent's responsibilities with the PIRA included "distribution of arms, gathering ammunition," J.A. 147, and training other PIRA members, J.A. 153. This involvement constitutes assistance in the PIRA's persecution of persons on account of political opinion. See *McMullen*, 788 F.2d at 600 (Goodwin, J., specially concurring).

II. THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETION IN CONCLUDING THAT RESPONDENT DID NOT IN ANY EVENT IDENTIFY CHANGED CIRCUMSTANCES OR NEW AND MATERIAL EVIDENCE WARRANTING THE EXTRAORDINARY REMEDY OF REOPENING

Even if, contrary to our submission in Point I, respondent would have been granted asylum or withholding of deportation if he had applied in a timely manner, the Attorney General did not abuse his discretion in concluding that respondent did not identify changed circumstances or new evidence that warranted reopening to permit a belated application for that relief.

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for offenses of a "political character" (see note 1, *supra*) did not bar the Attorney General from finding respondent excluded from eligibility for withholding of deportation under Section 243(h)(2)(C) based on a determination that his past conduct generally gave rise to serious reasons for "considering" that he committed serious nonpolitical crimes. Accord *McMullen* v. *INS*, 788 F.2d at 596-597; Pet. App. 44a n.8 (Lumbard, J., dissenting); cf. *McCleskey* v. *Zant*, No. 89-7024 (Apr. 16, 1991), slip op. 10.

A. The court of appeals believed reopening was required in light of Attorney General Meese's rejection of respondent's designation of Ireland as the country of deportation and the enactment of the 1987 Extradition Act in the Republic of Ireland. Pet. App. 12a-15a. In his brief in opposition (at 9-10, 16-17), respondent correctly points out that he did not rely on Attorney General Meese's decision when he sought reopening, see J.A. 58, 62-63, and he expressly disavows any reliance on that decision here as a justification for reopening.[26] Instead, as he did in the motion to reopen itself, respondent relies solely on the Irish Extradition Act, which implemented the European Convention on the Suppression of Terrorism by formally deleting certain crimes from the political offense exception. See page 6, *supra*.

The 1987 Extradition Act did not constitute newly discovered and material *evidence* that might have supported reopening under 8 C.F.R. 3.2, since it did not show the existence of persecution and therefore did not go to the merits of any claim for asylum or withholding of deportation. The court of appeals nevertheless believed the Irish Extradition Act furnished a "reasonable explanation" for respondent's failure to apply for asylum or withholding of deportation at an earlier date. Pet. App. 13a, 14a; see *Abudu*, 485 U.S. at 104-105. This holding was clearly wrong. The irrelevance of the new Act in Ireland follows *a fortiori* from Attorney General Meese's decision (with which Attorney General Thornburgh agreed) that respondent should be deported to the United Kingdom, not Ireland, Pet. App. 74a, 116a-130a—a decision that the court of appeals sustained, *id.* at 7a-9a, and that respondent did not challenge in this Court.

1. Withholding of deportation is "country-specific": it only bars deportation to a particular country, if the Attorney General determines that the alien's life or freedom would be threatened "in such country" for a prohibited reason. 8 U.S.C. 1253(h)(1). Respondent alleged that there was a likelihood that he would be persecuted in the United Kingdom and sought to avoid deportation to that country. The enactment of the 1987 Extradition Act in *Ireland* was utterly irrelevant to respondent's country-specific claim to withholding of his deportation to the *United Kingdom*. At the very least, the Attorney General did not abuse his discretion in so holding.

2. For similar reasons, the 1987 Irish Extradition Act had no bearing on the merits of respondent's asylum claim, which also was predicated on circumstances (alleged persecution) in the United Kingdom, not Ireland. Respondent contended that the Act was relevant because its passage rendered it more likely that he would be extradited to the United Kingdom if he was first deported to Ireland (as he originally requested). There are two flaws in this argument.

First, the Attorney General found that the 1987 Extradition Act did not constitute a material change in the law of extradition in Ireland. Pet. App. 70a-73a. He pointed out that on at least four separate occasions in the deportation proceedings themselves, the *respondent* had taken the position (when he was trying to convince the BIA to sustain the immigration judge's order that he be deported to Ireland) that, under pre-1987 decisions of the Irish Supreme Court narrowing the political offense exception, he would have been subject to extradition from Ireland to the United Kingdom. *Id.* at 70a-71a & n.25. In the Attorney General's view, the primary effect of the 1987 Extradition Act was to provide an express statutory basis for extradition in those circumstances. *Id.* at 71a. By the same token, the Attorney General pointed out that Section 8 of the 1987 Act (J.A. 105-106) provides for denial of extradition where there are substantial grounds for believing that it is sought for the purpose of persecution. Pet. App. 72a-73a & n.26. The upshot, the Attorney General concluded, was that the 1987 Act did not materially increase the likelihood that respondent would be extradited from Ireland to the United Kingdom. *Id.* at 73a. The

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[26] In any event, as we explain in the certiorari petition (at 23-24), Attorney General Thornburgh correctly ruled that Attorney General Meese's decision did not warrant reopening. Pet. App. 57a-58a, 67a-69a; see page 5, *supra*.

court of appeals did not dispute this assessment of the import of the 1987 Act.

Second, although a change in *United States* immigration law might have justified reopening of respondent's deportation proceedings if it altered the governing legal standards (cf. *Abudu*, 485 U.S. at 103 n.8), any change in *Irish* law wrought by the 1987 Extradition Act had no effect on the standards governing respondent's deportation or his eligibility for asylum—especially since he is to be deported to the United Kingdom, not Ireland. It therefore did not require reopening. Moreover, as the Attorney General pointed out, the 1987 Extradition Act simply gave effect to the European Convention, which Ireland had signed in February 1986, more than six months *before* respondent withdrew his asylum application and waived his right to apply for that relief. Pet. App. 67a-68a. Thus, even if the Attorney General would have been required to take a truly new and unforeseen development in Irish law into account in deciding whether to reopen the proceedings, he did not abuse his discretion in declining to do so here on the basis of the 1987 Extradition Act.

Reopening of deportation proceedings to permit an alien to apply for special relief he previously waived requires more than an explanation of the alien's motivations for his tactical choices; it requires a legally sufficient justification. A change in the legal climate in Ireland (even assuming a material change occurred here) simply does not meet that test. As Attorney General Thornburgh and Judge Lumbard explained, respondent is in the same position as a criminal defendant who pleaded guilty in the hope that the judge might impose a lenient sentence or on an understanding of the law that later proves erroneous. The defendant has no right to withdraw his plea in those circumstances, if it was voluntarily given on the basis of competent advice. Respondent likewise has no right to repudiate his waiver and have his case reopened. See Pet. App. 39a-41a, 81a & nn.39, 40 (citing *United States* v. *Broce*, 488 U.S. 563 (1989), and *Brady* v. *United States*, 397 U.S. 742, 757 (1970)).

B. When respondent filed his motion to reopen, he submitted various materials concerning conditions in Northern Ireland. See note 5, *supra*. But respondent relied on those materials only for purposes of attempting to establish a prima facie case of eligibility for asylum or withholding of deportation (based on a fear or likelihood of persecution in the United Kingdom) *if* the proceedings were reopened to permit him to apply for that relief. As a justification for the reopening itself, respondent relied solely on the 1987 Irish Extradition Act; he did not contend that the materials he submitted independently justified reopening on the theory that they constituted *new* evidence or showed an increased likelihood of persecution in December 1987, as compared with September 1986, when he waived his right to asylum and witholding of deportation. J.A. 57-58. In accordance with that position, respondent argued in his brief to the Attorney General (at 8, 12-13, 14, 15-18), in his brief to the Second Circuit (at 20-22, 28-29, 55-56, 58-60 & n.34, 67, 71 n.40), and in his brief in opposition in this Court (at 9-11, 12-14, 16-17) that the sole basis of his motion to reopen was the 1987 Irish Extradition Act, and that the documents he submitted with his motion would constitute a prima facie showing of eligibility for asylum and withholding of deportation if reopening was granted.

Because respondent has consistently disavowed reliance on the evidence of alleged persecution in the United Kingdom as an independent justification for reopening, there is no need for this Court to review that evidence to determine whether it satisfies the newly discovered evidence test for reopening. See *Abudu*, 485 U.S. at 110 (citing *Taylor* v. *Illinois*, 484 U.S. 400, 414 & n.18 (1988) (whether the evidence probably would change the outcome)). In any event, the Attorney General thoroughly examined the evidence respondent submitted, Pet. App. 74a-78a, and concluded that it would not warrant reopening because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence

that was presented." *Id.* at 75a. That reasoned determination by the Attorney General plainly did not constitute an abuse of his discretion.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Attorney General's order denying respondent's motion to reopen should be affirmed.

Respectfully submitted.

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APRIL 1991

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

2. Section 207 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1152, provides in relevant part:

§ 1157. Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e) of this section), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitanian concern to the United States in accordance with a determination made by the President after appropriate consultation.

* * * * *

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney

General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

* * * * *

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) of this section or with respect to the admission of refugees in response to an emergency refugee situation under subsection (b) of this section, the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a) of this section, a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b) of this section, that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

3. Section 208 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158, provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the

case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child of alien granted asylum

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

4. Section 243(a) and (h) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253(a) and (h), provides in relevant part:

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon non-acceptance by country

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may there-

after be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. * * *

* * * * *

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

5. 8 C.F.R. 3.2 provides in relevant part:

§ Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision.

Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

6. 8 C.F.R. 208.11 provides in pertinent part:

§ 208.11 Asylum requests after completion of exclusion or deportation hearing.

An alien may request that an exclusion or deportation proceeding be reopened pursuant to 8 CFR 103.5 or 8 CFR 242.22 respectively, on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

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No. 90-929

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

JOSEPH PATRICK DOHERTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the respondent, having established a prima facie case for asylum, can be denied that relief under Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), in order to insure that he serve in the country denied his extradition the prison sentence there imposed on him for offenses found to be political under American law.

2. Whether the Second Circuit was correct that the Attorney General abused his discretion under the Refugee Act of 1980 when he denied the respondent's asylum application on the ground that granting it might be injurious to this country's relationship with the country denied the respondent's extradition and to various policy interests.

3. Whether the Second Circuit was correct that the Attorney General abused

his discretion by denying the respondent, who had established a prima facie case of entitlement, the nondiscretionary relief of withholding of deportation pursuant to Section 243(h)(1) of the Act, 8 U.S.C. 1253 (h)(1), without affording the respondent the evidentiary hearing to which the Board of Immigration Appeals (BIA) had found him entitled.

4. Whether the Second Circuit was correct that given the singular circumstances of the case, the Attorney General abused his discretion when he denied the respondent's motion to reopen to apply for asylum and withholding of deportation.

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No. 90-925

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JOSEPH PATRICK DOHERTY, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Preliminary Statement

Joseph Patrick Doherty, the respondent, has never been charged with or convicted of any offense against American criminal law. He has nonetheless been incarcerated for close to a decade in an American federal prison.

In 1984, U.S. District Court Judge John E. Sprizzo denied the request of the

British government for the respondent's extradition. He ruled that the acts for which Mr. Doherty was sought were political offenses, not common crimes, and his extradition was barred by the political offense exception provision of the controlling treaty. Judge Sprizzo found the facts of the case to "present the ... political offense exception in its most classic form." Mr. Doherty's acts were but the "latest chapters" in the "ancient struggle" for Ireland's freedom from British governance. Matter of Doherty, 599 F. Supp. 270, 273, 276 (S.D.N.Y. 1984).

In the intervening years, the executive branch has labored to subvert and circumvent the decision denying extradition. When its efforts to attack the decision were judicially rebuffed, it determined to force out of the immigration proceeding the result extradition law and

Judge Sprizzo's decision forbade. Interviewed on CBS 60 Minutes, the Immigration and Naturalization Service (INS) district director who handled the deportation proceeding stated:

> [I]n the extradition proceeding the objective was to get Doherty to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that. (C.A. App. 405.[1])

This effort to accomplish de facto the extradition denied de jure has produced decisions adverse to the government at every stage of the immigration proceeding. Unable to prevail before his own delegatees, one Attorney General and then another entered the case to issue deci-

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[1]"C.A. App." references are to the joint appendix in the Second Circuit. "Pet. App." references are to the appendix to the certiorari petition. "J.A." references are to the joint appendix filed in this Court.

sions adverse to Mr. Doherty. Such occurrence was unprecedented; so too were their decisions.

Confronted with the most recent ruling adverse to it, the petitioner asks this Court to reverse the Second Circuit and rule that Mr. Doherty can be denied refugee protection and deported without hearing to the country denied his extradition upon the Attorney General's assertion that handing him over would serve this country's policy interests. The Attorney General has never before claimed that the statutory protections of the Refugee Act of 1980 can be denied to one seeking asylum in order to confer a perceived political advantage upon this country. Such claim can be accepted only in derogation of core principles of refugee law.

The principle of refuge is ingrained in the fabric of American history and of

American law, the legacy of our own revolutionary heritage. Political offenders brought this country into existence. Owing to their exercise in what the British deemed treason, it was felt from the nation's earliest days that

> compliance with ... a demand [to surrender a political offender] would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind.[2]

Modern law, both international and domestic, protects refugees from delivery to countries where they reasonably fear persecution. This protection is available to refugees who are political offenders. Nonetheless, to deliver one particular

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[2]Secretary of State Marcy to Mr. Hulsemann, Sept. 26, 1853, Sec. Doc., 33rd Cong., 1st Sess., Vol. 1, 34, quoted in Banoff & Pyle, "'To Surrender Political Offenders': The Political Offense Exception to Extradition in United States Law," 16 N.Y.U. J. of Int'l L. & Politics 169 (1984).

political offender to the government denied his extradition, the Attorney General here argues for the abrogation of fundamental principles of refugee law.

STATEMENT OF FACTS

On June 18, 1983, Joseph Patrick Doherty was taken into custody. An INS order to show cause and warrant of arrest charged that he was subject to deportation by virtue of being an alien who had failed to establish the date, place, and manner of his entry. J.A. 5-6. Within ten days, Mr. Doherty filed a request for asylum. He feared persecution were he to be deported to the United Kingdom. J.A. 7-18.

The Extradition Proceeding: "The Facts of This Case Present the ... Political Offense Exception in Its Most Classic Form."

On June 27, 1983, a warrant of arrest issued under the extradition treaty between the United Kingdom and the United

States.[3] Matter of Doherty, 599 F. Supp. at 272. The immigration judge thereupon adjourned the immigration proceeding. See C.A. App. 45-46.

On August 16, 1983, the British government filed the formal extradition request. An affidavit stated that Mr. Doherty had been convicted in Northern Ireland of murder, attempted murder, and possession of firearms and ammunition. C.A. App. 240. The offenses were the result of an encounter between an Irish Republican Army (IRA) active service unit and a squad of British soldiers attached to the elite counterinsurgency unit known as the Special Air Service (SAS). J.A. 114-123. The warrant further alleged that Mr. Doherty was wanted for offenses arising from

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[3] See Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 230, T.I.A.S. No. 8468.

his June 10, 1981, escape--with seven other IRA volunteers--from a British prison in Belfast. C.A. App. 241, 744-755.

Hearings in March and April 1984 produced a voluminous record. Both sides put witnesses forward. Mr. Doherty testified at length. J.A. 109-190; C.A. App. 712-943. The judge concluded Mr. Doherty's offenses were unquestionably political, and his extradition therefore barred. Matter of Doherty, 599 F.Supp. 270. The Justice Department, through the person of a senior official, publicly attacked the decision as "outrageous." C.A. App. 489.[4]

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[4]A lead editorial in the National Law Journal observed:

> The style of their comments about the judge--whose decision was fully supported by the facts and the law--gives us great concern. For the head of the department's criminal division to express such outrage and make sarcastic comments is to demean the judicial process and the Justice Department itself. (C.A. App. 491.)

The Declaratory Judgment Action: The Government's Position is "Startling."

On February 4, 1985, the executive branch filed an action seeking a judgment declaring Joseph Doherty extraditable. C.A. App. 244-246. The action was unprecedented. United States v. Doherty, 786 F.2d 491, 500 (2d Cir. 1986).

The executive branch lectured the district court that its "'accepting Mr. Doherty's view would ... compel the government to continue refiling the [extradition] request until a favorable decision is obtained, however long that might take.'" Its behavior caused the district court to inquire "whether unlimited repetitions of judicially rejected contentions comport with the dignity of the United States Attorney's Office." The district court dismissed the action for failure to state a claim. United States v. Doherty,

615 F.Supp. 755, 760 n. 5 (S.D.N.Y. 1985).

The Second Circuit, in a 3-0 decision by the late Judge Friendly, affirmed the district court and pronounced the executive's position "startling." Judge Friendly observed that the government had not refiled the extradition request because it "fears it may lose when it tries again[.]" United States v. Doherty, 786 F.2d at 500.

The Deportation Proceeding: Successive Rulings in Favor of Mr. Doherty.

Three weeks after the filing of the declaratory judgment action, the INS lodged six new charges and twelve new factual allegations. J.A. 19-22. Mr. Doherty moved for an order staying the deportation proceeding. C.A. App. 32-77, 83-90. The immigration judge granted the motion, observing that controlling law mandated that extradition proceedings must be com-

pleted before deportation proceedings are concluded. C.A. App. 92-98.

As had the district judge, the immigration judge commented on the government's nonacquiescence to the decision denying extradition. He remarked that "for all intents and purposes ... it's still seeking extradition." C.A. App. 92.

The Immigration Judge Rules in Favor of Mr. Doherty.

When the executive branch did not challenge the Second Circuit's decision by the September 2, 1986, deadline, Mr. Doherty's counsel notified the immigration judge that the deportation proceeding could resume. At conferences on September 5 and 12, 1986, the respondent advised the immigration judge that he would not contest deportation. J.A. 30, 33.

Mr. Doherty requested only that, pursuant to Section 243(a), 8 U.S.C. 1253(a),

of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 et seq., he be permitted to designate Ireland as his country of deportation. In conjunction with designating Ireland, he withdrew his application for asylum and withholding of deportation from the United Kingdom. J.A. 32; Pet. App. 14a. He did so knowing that Ireland would receive him.[5] He also knew that no designation of country had ever been rejected on the ground of prejudice to the interests of the United States. The INS had never even raised such claim in the entire life of the controlling statute. See 8 U.S.C. 1253(a).

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[5]The respondent is a citizen of Ireland. C.A. App. 181-206. There had never been any doubt that the Irish government would accept him into its territory. A letter from the Irish vice-consul, made available to the immigration judge and the INS, confirmed Mr. Doherty's earlier representations on the subject. C.A. App. 105, 127, 258-259.

The INS raised it here, asserting that Mr. Doherty's deportation to other than the country denied his extradition would be prejudicial to the interests of the United States. It stated that Mr. Doherty was a "terrorist" and that

> Great Britain sought to extradite [him] for his crimes[6] from the United States. That did not succeed. .... To allow Mr. Doherty ... to go to ... Ireland where it's not [at] all clear that he will be punished for his crimes ... would be contrary to the public interest[.] (J.A. 35.)

The INS stated that the case was a matter "of some concern at the highest levels of government" and would "be under the personal review of Attorney General [Meese][.]" J.A. 39. The immigration judge granted it a third adjournment. J.A. 43-44. When the hearing resumed, the

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[6]These "crimes" were the offenses found by Judge Sprizzo to be political and therefore a flat bar to the de facto extradition the INS was seeking.

INS stated it had nothing further to submit. J.A. 48-49. The immigration judge thereupon ordered Mr. Doherty deported to Ireland.[7] Pet. App. 156a-159; C.A. App. 214.

The BIA Rules for Mr. Doherty for the First and Second Times.

The INS appealed the immigration judge's decision. C.A. App. 215-217. On March 11, 1987, the BIA rendered a unanimous decision, adverse to the INS. Pet. App. 148a-155a. It could find no other case in which a deportee's designated country had been rejected on the ground of prejudice to U.S. interests. Designation being a substantive right, the BIA held that rejection of the deportee's designat-

[7]Mr. Doherty could be deported to the United Kingdom only if Ireland was unwilling to accept him, or failed to advise the Attorney General as to its position on acceptance. Pet. App. 159a. See 8 U.S.C. 1253(a).

ed country on that ground would be improper "in the absence of clear evidence to support that conclusion." The BIA found that the INS had produced none. Pet. App. 154a-155a.

By motion to reopen, the INS sought to submit an affidavit by the associate attorney general who had earlier denounced Judge Sprizzo's decision as outrageous. C.A. App. 299-338; J.A. 51-54. The affidavit set forth the official's opinion that it would be prejudicial to U.S. interests to deport Mr. Doherty to Ireland.

In a 3-2 decision, the BIA denied the INS's motion,[8] but reopened on its own motion. Pet. App. 134a-147a. The BIA found the affidavit unsatisfactory because it was not "based upon evidence that the

[8]The BIA held that the INS had failed to comply with the regulations governing motions to reopen. Pet. App. 135a-140a.

respondent's deportation to ... Ireland will be prejudicial to the United States' interests." Pet. App. 135a, 140a-141a.

The INS, pursuant to 8 C.F.R. 3.1(h)(iii), certified the decision to the Attorney General, who, for five months, did nothing. C.A. App. 356. Mr. Doherty was eventually notified that he would be permitted until December 1, 1987, to file a brief. J.A. 68-70.

Mr. Doherty Files His Motion to Reopen.

The Extradition (European Convention on the Suppression of Terrorism) Act, 1987 (Extradition Act 1987) (J.A. 94-108) was possibly to go into effect in Ireland on December 1, 1987. J.A. 107 [section 13.-(1)]. The Extradition Act 1987 would alter profoundly the extradition law which had previously governed in Ireland. When implemented, it would operate to guarantee Mr. Doherty's certain removal from Ire-

land, the country to which he had been ordered deported, to the United Kingdom, where he feared persecution.

Section 3 of the Extradition Act 1987 had no statutory forebear in Irish law. It specified that certain offenses could not be regarded as political offenses. As to those offenses, extradition would be mandatory subsequent to the act's implementation. J.A. 98-99. Subsection (3)(a)(v) covered offenses for which the British government previously had sought Mr. Doherty's extradition.

Despite uncertainty about when, or even whether, the Extradition Act 1987 would be implemented, uncertainty purposefully made express in the legislation itself,[9] the Extradition Act was permitted to become effective on December 1, 1987.

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[9] See J.A. 107-108 (section 13) and C.A. App. 391-392 (section 12).

With its implementation, the 15-month-old order directing the respondent's deportation to Ireland became the functional equivalent of an order directing his extradition to the United Kingdom.

Having at all times resisted being returned to the United Kingdom, where he feared persecution, Mr. Doherty filed a motion to reopen within 48 hours of the change in the law. J.A. 55-108; C.A. App. 421-455. He sought to reassert the applications for asylum and withholding of deportation he had filed on June 28, 1983, and withdrawn only in conjunction with his designation of Ireland, the country that had agreed to receive him.

Detailed affidavits supported the motion.[10] The affidavit of Mr. Doherty's

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[10]Mr. Doherty's motion also encompassed his asylum application. J.A. 6-18. The BIA had other documents relevant to the motion before it as well. C.A. App. 503-943; J.A. 109-190.

counsel addressed the effect of the 1987 Extradition Act's implementation on Irish law in general and on Mr. Doherty's position in particular. J.A. 57-77, 91-108. An affidavit and supporting documents from the respondent's mother chronicled those facts, both as to family history and as to events in Northern Ireland, which, in conjunction with Mr. Doherty's application for asylum, detailed the basis for his fear of persecution in the United Kingdom.[11] J.A. 78-89; C.A. App. 421-455.

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[11]Threats have already been made by the security forces to family members about that which awaits the respondent upon his return. J.A. 78-89. The security forces and the loyalist paramilitaries have the will and ability to carry the threats out. C.A. App. 503-709. The number and frequency of fatal shootings by the security forces of young men believed to be members of or sympathizers of the republican movement caused Amnesty International to conclude that "a wide-ranging judicial inquiry is essential." C.A. App. 514-516, 517-518, 543-544. (continued)

The BIA referred his motion to the Attorney General. Pet. App. 131a-133a.

Attorney General Meese Reverses the BIA Decision in Mr. Doherty's Favor.

On June 9, 1988, Attorney General Meese reversed the order directing Mr. Doherty's deportation to Ireland. He

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(cont.)Family members have been subject to repeated arrest and interrogation. A sister's home has been often raided by the security forces; on one such occasion, the security forces seized the transcript of Mr. Doherty's testimony before Judge Sprizzo. Relatives, friends, and neighbors have been victims and targets of sectarian attacks running the gamut from beatings, to attempted murder, to actual murder. Mr. Doherty's family and the other occupants of their tiny nationalist enclave live subject to the intrusive daily presence in their homes and on their streets of the British Army and the paramilitary Royal Ulster Constabulary (RUC). In addition to Mr. Doherty, a sister was interned by the British government and, as with him, imprisoned without charges and without trial. The family home was destroyed when bombed by loyalist paramilitaries. In addition, Mr. Doherty has already been the victim of persecution in the United Kingdom, having been tortured and beaten while in the custody of the security forces. J.A. 8-18, 78-89; C.A. App. 422-455.

ordered Mr. Doherty deported to the United Kingdom instead. Pet. App. 116a-130a. The Attorney General remanded Mr. Doherty's motion to reopen--filed specifically to protect against deportation to the United Kingdom--to the BIA. Pet. App. 130a.

Attorney General Meese ruled that Mr. Doherty was to be deported to the United Kingdom because, having committed "serious crimes" in the United Kingdom, it would be prejudicial to U.S. interests were he not to serve his sentence there. Pet. App. 125a-126a. Deportation to Ireland also "would require the United Kingdom to invoke Irish law to secure respondent's return[,]" a prospect the Attorney General evidently found objectionable. Pet. App. 126a.

The Attorney General credited representations by a Department of State undersecretary for political affairs that the

British government had been "'great[ly] disappointed'" by the decision denying extradition and was very keen "'that the United States effect Doherty's deportation to the United Kingdom[.]'" The Attorney General concluded that if the British government's disappointment over the denial of its extradition request was not assuaged by handing Mr. Doherty over, the denial of the extradition request notwithstanding, U.S.-U.K. relations would be injured and that would be prejudicial to the interests of the United States. Pet. App. 126a-127a.

The BIA Decides in Mr. Doherty's Favor for a Third Time.

The BIA, having had Mr. Doherty's motion to reopen remanded to it by the Attorney General, granted the motion, 3-2, on November 14, 1988. Pet. App. 108a-115a.

The BIA took express note of the cir-

cumstances which had existed at the time of Mr. Doherty's designation of Ireland and upon which he had based his designation. Reopening was justified because subsequent to his designation, "unprecedented circumstances" he "could not have been expected to anticipate" rendered him subject to deportation to a different country, where he feared persecution. The BIA reasoned that if the regulations were read to require Mr. Doherty

> to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum to any country to which he might remotely be deported, if he had a fear of returning there.

Pet. App. 99a. The BIA also determined that the evidence submitted by Mr. Doherty established a prima facie claim of persecution. Id. The particulars of the case --including the fact that a United States court had found his offenses to be politi-

cal--merited granting the motion in the BIA's discretion. Pet. App. 99a-100a.

Again, the INS referred the BIA decision in favor of Mr. Doherty to the Attorney General. C.A. App. 963.

Attorney General Thornburgh Rules: Return Doherty, Without Any Hearing, to the Country Denied His Extradition and Where He Fears Persecution.

On June 30, 1989, the Attorney General reversed the BIA decision that had granted Mr. Doherty a hearing on his claims for asylum and withholding of deportation.[12] Pet. App. 46a-91a.

Attorney General Thornburgh determined that Attorney General Meese's decision directing deportation to the United Kingdom was not "an unforeseen, adverse

[12]Attorney General Thornburgh claimed that the regulations governing consideration of motions to reopen do not bind the Attorney General. Pet. App. 55a. Attorney General Meese had earlier advanced the same claim, also without any authority. Pet. App. 121a and n. 6.

administrative decision, constituting a 'new fact,'" a view rejected by the BIA and subsequently to be rejected by the Second Circuit as well. Pet. App. 13a-14a, 57a, 62a, 65a-67a, 98a-99a. Mr. Doherty had had no occasion to claim it was, since his motion to reopen had been filed six months before the Meese decision issued.

The Attorney General found that the Extradition Act was not "previously unobtainable material evidence" or "reasonable justification permitting respondent to withdraw his waiver of his claim for asylum." He determined that implementation of the Extradition Act was "neither sudden nor unforeseeable." Eschewing reference to its Section 3, he further determined that it had no material effect on Mr. Doherty's position. App. 59a-71a, 74a.

Although the BIA had found that Mr.

Doherty's evidence of persecution was sufficiently compelling to warrant reopening, Attorney General Thornburgh denied the ultimate relief sought, without affording the respondent the hearing ordered by the BIA. Pet. App. 81a-91a. The Attorney General did not balance the nature and degree of persecution awaiting Mr. Doherty in the United Kingdom against any of the considerations recited to justify the Attorney General's negative exercise of discretion. The Attorney General did not dispute that Mr. Doherty's submissions on the issue of persecution established prima facie entitlement to the relief sought. Pet. App. 64a n. 21; see also Pet. App. 12a. Rather, he asserted it was "unnecessary" to address that issue, because Mr. Doherty had--or probably had--committed serious nonpolitical crimes and engaged in the persecution of others and was there-

fore ineligible for the relief sought. App. 83a-88a.

The Decision at Issue: The Second Circuit Rules That Attorney General Thornburgh Abused His Discretion.

The Second Circuit, 2-1, "conclude[d] that in the singular circumstances of this case [Attorney General Thornburgh] abused his discretion in denying Doherty's motion to reopen." Pet. App. 12a. It unanimously affirmed the Meese order, holding that under 8 U.S.C. 1253(a), Congress had "left the Attorney General broad discretion to determine what constitutes prejudice to national interests," and that such finding is "'essentially unreviewable[.]'" Pet. App. 8a.

Writing for the majority, Judge Pratt stressed that Attorney General Thornburgh's determinations as to the ultimate availability of the relief sought could not properly be made on the existing re-

cord.[13] As to the withholding of deportation claim, the need for an evidentiary hearing was "obvious" as Mr. Doherty's ultimate success or failure turns on the

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[13]Judge Lumbard, dissenting, agreed that "[t]he real issue is the adequacy of the record" and that the case was "extraordinary" and "unusual." Pet. App. 45a, 34a-35a. He noted that "political judgments are at the heart of the decision not to reopen this case." Pet. App. 33a.

Judge Lumbard concluded no hearing was warranted because in seeking to be deported to a country where he would not be persecuted, Mr. Doherty was "manipulat-[ing] the process" and engaging in a "procedural ploy," and was therefore undeserving of asylum. Pet. App. 38a-39a.

The Attorney General's decision was also found by Judge Lumbard correctly to have denied withholding of deportation. The record provided adequate basis for concluding that the respondent had engaged in serious nonpolitical crimes and participated in persecution on account of political opinion. Pet. App. 43a-44a.

Judge Lumbard dismissed the decision of Judge Sprizzo as of "no precedential value," noting that the Second Circuit had not reviewed it on the merits. Pet. App. 44a. He took no note that the Second Circuit had concluded that "Judge Sprizzo engaged in a careful analysis of the political offense exception." United States v. Doherty, 786 F.2d at 493-494.

resolution of "formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record." Pet. App. 16a-17a. The correct resolution of the asylum claim is also dependent on "facts ... more properly determined at a hearing[.]" Pet. App. 26a-27a.

The Second Circuit found that Attorney General Thornburgh "seriously exceeded his discretion" when he denied Mr. Doherty asylum on the ground that deporting him to the United Kingdom, his fear of persecution notwithstanding, would serve United States policy interests. Pet. App. 26a. Attorney General Thornburgh's decision was premised "on the types of geopolitical concerns that congress intended to eliminate from asylum cases" (Pet. App. 25a), and thus was not based on "the 'legitimate concerns' of the relevant statutory provision," the Refugee Act of 1980, Pub. L.

No. 96-212, 94 Stat. 102. Pet. App. 18a.

The Second Circuit rejected Attorney General Thornburgh's "foreseeability" standard, finding it had no foundation in law and "would lead to absurd consequences" if applied. It concurred with the BIA that if an applicant were obliged to foresee all eventualities and guard against them, the process of litigating asylum applications would become unmanageable. Pet. App. 12a-13a.

The Second Circuit also rejected Attorney General Thornburgh's determination that Mr. Doherty had "waived" his right to seek asylum and withholding of deportation. Any notion that the deportee "assumes the risk" of adverse consequences from subsequent changes in circumstances is "incompatible with any motion to reopen[.]" Pet. App. 27a. In conclusion, the court rejected "the government's pro-

fessed concern for the 'integrity of the administrative process' [as] unconvincing in light of its own actions in this case." Pet. App. 28a.

Summary of the Argument

The Attorney General cannot deport Mr. Doherty to the country denied his extradition without a hearing on the likelihood of him being persecuted there. The Attorney General expressly stated that he denied Mr. Doherty's asylum application to insure that he serves in the United Kingdom a prison sentence imposed under that country's laws. The sentence was imposed for acts found to be political offenses by an American judge.

The option of refiling the extradition request has at all times been available to the British government. The political offense exception provision, which previously had barred Mr. Doherty's extra-

dition, has since been eviscerated by a supplementary treaty.

Under this unusual combination of circumstances, the effort to accomplish de facto the extradition denied de jure is an impermissible circumvention by the Attorney General of the laws governing extradition and an irregular use by him of the laws governing immigration. It is a further abuse of his discretion to deny Mr. Doherty's applications for asylum and withholding of deportation without affording him an evidentiary hearing, since Mr. Doherty would be entitled, as a matter of right under the renegotiated extradition treaty, to an evidentiary hearing that would be essentially coterminous.

The Attorney General cannot deny Mr. Doherty the relief of withholding of deportation in the absence of a hearing. The BIA and the Second Circuit determined

that he was entitled to one given the strength of the documentation supporting his motion to reopen.

Withholding of deportation is mandatory upon a showing that the individual's life or freedom would be threatened in a particular country. Because it must be granted if the requisite showing is made, the Attorney General cannot deny withholding of deportation without a hearing where the applicant has demonstrated prima facie eligibility. The BIA determined, by grant of Mr. Doherty's motion to reopen, that he had made the requisite showing. The Second Circuit was quite correct in determining that under these circumstances, the Attorney General abused his discretion when he deprived Mr. Doherty of the hearing ordered by the BIA.

The Attorney General engaged in a further abuse of discretion when he simul-

taneously deprived Mr. Doherty of the ordered hearing and denied him the ultimate relief of withholding of deportation on the grounds that he had committed serious nonpolitical crimes and that he had participated in the persecution of people described by the Attorney General as political opponents of the IRA. The Attorney General's findings of fact and conclusions of law on the political crimes issue were directly at odds with the decision that had held that Mr. Doherty had committed "classic" political offenses. The judge rendered that decision on the basis of a voluminous record, which the Attorney General had not examined, and after having observed Mr. Doherty on direct and cross examination, which the Attorney General had not done.

The determinations that Mr. Doherty had committed serious nonpolitical crimes

and engaged in the persecution of others were contrary to the controlling case law, without any support in the evidence of record, and, further, were premised on adjudicative facts said to be in the record of another--unrelated--proceeding. As to that proceeding, there was non-identity of parties and non-identity of issues. As to either ground of exclusion, the controlling regulations require that the applicant be afforded the opportunity to establish that the exclusion does not apply. The Attorney General further abused his discretion by denying Mr. Doherty this opportunity.

The Attorney General cannot deny asylum to an applicant on the ground that such denial serves the policy interests of this country. The claim that he can is a broadside attack on the Refugee Act of 1980. The Refugee Act was passed to con-

trol the Attorney General's discretion in asylum matters, not to enhance it, and to protect, not policies, but people from harm. The humanitarian and protective purpose of the asylum provision will be rendered illusory if it is interpreted to countenance the return of refugees to persecution because that is politically expedient.

The petitioner's argument ignores entirely the humanitarian and protective nature of the asylum provision of the Refugee Act, as well as the fact that its protections are available to those who have committed political crimes. The United Nations Convention Relating to the Status of Refugees excludes from protection those who have committed serious nonpolitical crimes, not serious political crimes. To the extent exclusion clauses like the serious nonpolitical crimes pro-

vision are applied, they must be applied restrictively. An expansive approach to the scope of protection available under the Refugee Act is demanded by our accession to the United Nations Protocol Relating to the Status of Refugees. The Refugee Act was enacted for the express purpose of conforming our law to the Convention and Protocol.

Other sections of the immigration law that confer broad grants of discretion on the Attorney General do not establish that he permissibly exercises similarly broad discretion under Section 208(a), 8 U.S.C. 1158(a). The Refugee Act, of which that section was part, was enacted specifically to provide protection solely on the basis of the needs of the individual for such protection.

No case has ever held that asylum may be denied on the basis of policy consider-

be denied on the basis of policy considerations, and the executive branch has in fact recently settled a major lawsuit on the basis of a stipulation that concedes that policy considerations are irrelevant in determining an applicant's eligibility for asylum. If the ultimate determination as to the grant of asylum can be based on policy considerations proscribed in determining simple eligibility, then refugees can be, and will be, reduced to objects of international barter.

ARGUMENT

I. ATTORNEY GENERAL THORNBURGH ABUSED HIS DISCRETION AND ACTED WITHOUT AUTHORITY WHEN HE DENIED ASYLUM IN ORDER TO INSURE THAT MR. DOHERTY SERVED HIS SENTENCE IN A BRITISH PRISON.

The British government wishes to inflict punishment on Joseph Doherty for acts it deems to be common crimes. Judge Sprizzo concluded that these acts were political offenses in their "most classic

form" and Mr. Doherty's extradition was therefore barred. Matter of Doherty, 599 F.Supp. at 276.

The decision was the fourth time in six years that an American court had denied on political offense grounds the request of the British government for a member of the IRA.[14] The protection afforded to dissidents by the exception has not successfully been claimed by other than three Irish republicans--McMullen, Mackin, and the respondent--for now more

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[14]See also Quinn v. Robinson, No. C-82-6688 RPA (N.D. Cal. Oct. 3, 1983); In re Mackin, 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981); In re McMullen, Magistrate No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

Quinn successfully challenged an order certifying his extradition. The Ninth Circuit reversed the decision granting his petition for a writ of habeas corpus, and he was promptly extradited to the United Kingdom. See Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986), cert. denied, 479 U.S. 882 (1986).

than three decades.[15]

The Departments of Justice and State disliked the McMullen, Mackin, and Doherty decisions. Departmental officials determined that the U.S.-U.K. extradition treaty must be changed to preclude judicial determinations adverse to the British government when it seeks extradition of a partisan in the struggle for Irish independence. See, e.g., Hearing on the Impact of the Supplementary Treaty Upon American Domestic Law and Upon the Ameri-

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[15]Over the past three decades, the political offense exception has been invoked in only 24 cases. In the past two decades, only three of the British government's 64 extradition requests have been denied on the political offense ground. See generally "Abrogating the Relative Political Offense Exception to Extradition: The United States-United Kingdom Extradition Treaty," 20 J. Marshall L. Rev. 453 (1987); Bassiouni, "The Political Offense Exception Revisited: Extradition Between the U.S. and the U.K. - A Choice Between Friendly Cooperation Between Allies and Sound Law and Policy," 15 Den. J. Int'l L. & Pol'y 255 (1987).

can Constitutional Process in the Fight Against Terrorism Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 55-77 (1985).

The treaty was renegotiated. Supplementary Extradition Treaty With the United Kingdom, S. Tr. Doc. No. 99-8, 99th Cong., 1st Sess. (1985); S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. (1986). A new supplementary treaty foreclosed magistrates and judges sitting in extradition from finding any of the offenses enumerated therein as political. After 13 months of bitterly contentious hearings, the supplementary treaty was approved, although in a form different from that pressed upon the Senate by the executive branch. 132 Cong. Rec. 16,558 (1986) (Senate Resolution of Ratification). The political offense exception to extradition as between the

United States and the United Kingdom essentially ceased to exist, however.

Nothing in the law, either prior to or after the enactment of the supplementary treaty, precluded the British government from refiling its request for the extradition of the respondent. It has never done so.

The Department of Justice has sought to insure that, Judge Sprizzo's decision notwithstanding, Joseph Doherty is handed over to the British government, in order that he serve in the United Kingdom the sentence there imposed on him for the offenses found by Judge Sprizzo to be political, not criminal. The petitioner has expressly admitted that the deportation proceeding has been merely "an alternate means" to accomplish "the objective

... to get Doherty to the United Kingdom."[16] See p. 3 supra. Attorney General Meese specifically stated that he must be deported only to the United Kingdom because "it is ... in the interests of the United States that respondent serve his sentence in the United Kingdom." Pet. App. 126a. The punishment rationale was in turn subscribed to by Attorney General Thornburgh, who expressly predicated his discretionary denial of asylum on it. Pet. App. 82a.

Whether or not the Attorney General can deport an individual to a country denied his extradition, he cannot here deny Mr. Doherty asylum in order to accomplish that end. A foreign country's dis-

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[16]In pursuit of this objective, Mr. Doherty thus became the sole deportee to have his designation of country disallowed as prejudicial. Pet. App. 155a. Designation is a substantive right. Landon v. Plasencia, 459 U.S. 21, 26 (1982).

gruntlement with an American judge's decision denying extradition is simply not a valid ground for a negative exercise of discretion.

The laws governing deportation and asylum were not enacted to accomplish the return of fugitives--be they political offenders or common criminals--to governments seeking to try or to punish them. The laws governing extradition were. See 18 U.S.C. 3181 et seq. Under those laws, the Attorney General is utterly without authority to determine whether a fugitive is to be returned to a requesting foreign government in order that he or she may be tried or punished for crimes. That mission is expressly limited to extradition magistrates and, in the event extradition is certified--which here it was not--to the Secretary of State. See 18 U.S.C. 3184, 3186.

The distinction between the processes of deportation and extradition is clear. "[E]ach has the effect of removing a person from the country," but they "are different things, and have different purposes." Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893). Extradition is the surrender of a criminal accused for the purpose of trial, or, if already convicted, punishment. In marked contrast,

> "[d]eportation" is the removal of an alien out of the country, ... without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.

Id. Deportation involves no other sovereign and implicates no consideration beyond the alien's expulsion from this country.[17] McMullen v. INS, 788 F.2d 591, 596

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[17]There is here another sovereign involved. The British government experienced "great disappointment" at the denial

(9th Cir. 1986).

The petitioner itself told the Second Circuit that

> [d]eportation and extradition are two entirely different processes having separate statutory bases. Deportation seeks the expulsion of aliens from the United States .... Extradition seeks the transfer of a fugitive for criminal prosecution in a specific foreign state with which the United States has a treaty ....
>
> The deportation statute, on its face, makes no mention of extradition .... [U]nlike the subject of an extradition proceeding, a deportee ... has the right to choose initially the country to which he will be deported. By preserving this statutory right for Nazi persecutors, Congress made it clear that despite their heinous crimes, such persons were to be treated as deportees, not extraditees.[18] (emphasis in original) (citations omitted).

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of its extradition request and "has repeatedly and vigorously expressed its desire that the United States effect Doherty's deportation to the United Kingdom[.]" Pet. App. 126a.

[18]This has not been the treatment the Attorneys General afforded Mr. Doherty. He was not "given the same opportunity given to any deportee to designate a country to which he wished to be sent." Linnas v. INS, 790 F.2d 1024, 1031 (2d Cir. 1986), cert. denied, 479 U.S. 995 (1986). The overriding of Mr. Doherty's designated country, combined with Attorney General Thornburgh's discretionary denial of asylum for the reasons he stated, operate to "transform the deportation ... into an extradition." Id.

Brief of Respondent INS, No. 85-4163, at 45-46, Linnas v. INS, 790 F.2d 1024.

The extradition statute is wrongfully circumvented and the immigration laws abused when the latter are employed to return a fugitive to a country denied his extradition in order that he serve his sentence in that country. The immigration laws of this country were not enacted to facilitate the punishment of one convicted of an offense against another country's laws. Fong Yue Ting v. United States, 149 U.S. at 709. Nonetheless, that is the purpose for which they are here being

used. If, however, Mr. Doherty is to be removed from this country for the purpose stated--to serve in the United Kingdom the sentence imposed on him in the United Kingdom--then he must be removed by way of extradition, not by deportation pursuant to a denial of asylum.

This use of the immigration statutes to accomplish the function reserved to the extradition statute is made more irregular given the facts of the case. In the extradition proceeding, the offenses were determined to be political offenses, and the respondent's return, whether for purposes of trial or the serving of sentence, was flatly barred. Immigration law is not a legitimate way around that result.

Historically, no precept of law has been more universally accepted than the principle of refuge for political offenders. In this country, it has been incor-

porated into extradition law and immigration law both. The political offense exception affords protection to political offenders against extradition. Immigration law protects those who commit political crimes against return to any country where his or her life would be threatened. See, e.g., Banoff & Pyle, 16 N.Y.U. J. of Int'l L. & Politics 169.

Newly-emerged democratic states, sensitive to their own histories, embraced the principle of nonsurrender of political offenders. Companion to it was the principle of refuge or asylum. The notion that an individual may have engaged in acts of political violence did not, during the 19th century when the political offense exception became firmly fixed, in any way make him or her an unworthy candidate for the protection afforded by nonsurrender and asylum. Precisely because

their offenses were political, rebels were thought to be especially in need of protection; as to them the danger of persecution was so great that "the granting of asylum ... [came] generally to be regarded as a duty." Garcia-Mora, "The Present Status of Political Offenses in the Law of Extradition and Asylum," 14 U. Pitt. L. Rev. 371, 373-374 (1953). The political character of Mr. Doherty's offenses but exacerbates the impropriety of denying him asylum in order to insure that the British government can punish him for those very offenses.

Without affording Mr. Doherty the protection of the hearing ordered by the BIA, Attorney General Thornburgh denied his requests for asylum and withholding of deportation on the merits. Were a new request for Mr. Doherty's extradition made, he would be absolutely entitled to a hear-

ing on the issue of persecution. Under Article 3(a) of the supplementary treaty, the hearing would be for the purpose of determining whether, if surrendered, Mr. Doherty would be "punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." See S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. 16 (1986).

Clearly, both the British government and the Attorney General fear the prospect of a hearing on the issue of whether Mr. Doherty would be persecuted for proscribed reasons in the United Kingdom. Were it not so, the British government would have requested Mr. Doherty's extradition under the amended treaty, just as it requested Peter McMullen's. See In re the Requested Extradition of Peter Gabriel John McMullen, 86 Cr. Misc. #1 (S.D.N.Y. filed Dec. 1986); "Abrogating the Relative Political

Offense Exception to Extradition," 20 J. Marshall L. Rev. at 462 n. 58. Since it has not done so, the executive branch obviously views it as imperative to withhold its immigration counterpart. Were such hearing to be afforded Mr. Doherty in the immigration context, it would intrude upon the ability of the executive branch to execute the de facto extradition it struggles to realize through impermissible manipulation of the immigration laws. To that end it goes to frightening lengths to deprive the respondent of even a hearing.

II. THE SECOND CIRCUIT WAS CORRECT THAT ATTORNEY GENERAL THORNBURGH ABUSED HIS DISCRETION BY DENYING MR. DOHERTY THE ULTIMATE RELIEF OF WITHHOLDING OF DEPORTATION AND ASYLUM WITHOUT AN EVIDENTIARY HEARING, DESPITE THE BIA HAVING FOUND THAT ONE WAS WARRANTED.

A. Mr. Doherty is entitled to a hearing on his claim for withholding of deportation in order that the formidable issues of fact which control its disposition may be addressed on the basis of a fully-developed record consisting of evidence submitted by the parties to this case.

Without affording Mr. Doherty the hearing to which he has been found to be entitled, neither the Attorney General nor any other finder of fact can determine that he is not entitled to withholding of deportation, either because he has not established that his life or freedom would be threatened in the United Kingdom or because he falls under the two exclusion provisions relied on by the Attorney General, sections 243(h)(2)(A) and (h)(2)(C), 8 U.S.C. 1253(h)(2)(A) and (h)(2)(C). The nature of the relief mandated by Section 243(h)(1), 8 U.S.C. 1253(h)(1), dictates that Mr. Doherty must be afforded a hearing on his application. The Attorney General may not deprive him of it simply because a motion to reopen is implicated.

Motions to reopen are rarely granted by the BIA. In discussing its policy as to reopening, a former BIA chairperson

stated that "the Board will not reopen a case except for real and substantial reasons." 1 Gordon & Mailman, Immigration Law and Procedure Section 3.05[7][d] at 3-73 (rev. ed. 1991).

The BIA was satisfied that Mr. Doherty had presented real and substantial reasons; the Second Circuit endorsed the BIA's conclusion. It recognized that the mandatory nature of the withholding remedy dictated a hearing upon a showing of prima facie eligibility.[19] Pet. App. 16a.

Withholding of deportation is statutorily mandated by Section 243(h)(1), 8 U.S.C. 1253(h)(1), when an individual is

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[19]The petitioner hints that Mr. Doherty did not establish prima facie eligibility for withholding of deportation. Petitioner's Brief at 35 n. 20. The BIA's order would not have permitted him leave to reopen to pursue that relief had he not. The order, however, speaks clearly in terms of both asylum and withholding. Pet. App. 100a.

able to establish that if "deported" or "returned" to a particular country, his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." If the individual demonstrates a clear probability of persecution, i.e., that it is "more likely than not" that she or he would be subject to persecution in the country of return, withholding of deportation must be granted. INS v. Stevic, 467 U.S. 407 (1984).

Section 243(h)(1) is the legislative embodiment of Article 33.1, the nonrefoulement provision, of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951). INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987). The United States acceded to the United Nations Protocol Relating to the Status of Refugees in 1968, thereby bind-

ing itself to comply with Articles 2 through 34 of the Convention. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. Id.

Article 33.1 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on any of the proscribed grounds. 189 U.N.T.S. 150, reprinted in Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") 70 (1979). In enacting the Refugee Act of 1980, of which Article 33.1 is an integral part by virtue of it Section 243(h)(1), Congress acted specifically to bring domestic law into conformity with the Convention and Protocol. The

provisions of the Refugee Act, as codified in the Immigration and Nationality Act of 1952, must be interpreted and applied in a manner consistent with the Convention. INS v. Cardoza-Fonseca, 480 U.S. at 436-437.

Attorney General Thornburgh's decision to deny Mr. Doherty the relief of withholding of deportation, without a hearing at which his entitlement to that relief could be addressed, flows from the Attorney General's fundamental misapplication of Section 243(h)(1) and from a fundamental abuse of his discretion relative to motions to reopen.

INS v. Abudu, 485 U.S. 94 (1988), identified three grounds on which a decisionmaker can deny a motion to reopen, thus depriving the movant of a hearing. Under Abudu, a motion to reopen cannot be denied on the ground that the movant would not be entitled to the ultimate relief

sought when the relief that is sought is nondiscretionary:

> [I]n cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead ... over the two threshold concerns ... and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. Id. at 105 (emphasis added).

Abudu thus permits the decisionmaker to deny relief in the context of a motion to reopen only when the relief is discretionary. Here it is not. Relying on Abudu, the Second Circuit rejected Attorney General Thornburgh's claim that he could decline to reopen even when the movant had established a prima facie case for withholding of deportation. Pet. App. 16a.

The INS strains to find an interpretation of Abudu that would legitimize the Attorney General's having done what the

case so plainly says he may not. It therefore argues that "the undisputed facts in the existing record rendered respondent ineligible for withholding" and therefore it is "closely analogous" to the situation in Abudu where reopening can be denied when the movant fails to establish prima facie eligibility for the relief sought. Petitioner's Brief at 36, 37. The petitioner's argument founders on the existing record.

The Attorney General's determinations of fact and law were wholly at odds with those rendered by the judge who presided over the only evidentiary hearing Mr. Doherty has ever had. Unlike the Attorney General, Judge Sprizzo had observed Mr. Doherty testify. The judge also had had before him significant quantities of other

testimonial and documentary evidence.[20]

Evidence as to Mr. Doherty's period of service with the IRA and as to the IRA itself were before Judge Sprizzo, and his decision so reflects. After having observed Mr. Doherty throughout direct and cross examination and having considered the extensive proofs put forward, both by him and by the British government, Judge Sprizzo issued a decision declaring his offenses to be quintessentially political. That decision narrowly defined offenses which properly could be considered political and rejected the traditional two-pronged analysis as an insufficiently rigorous measure for offenses associated

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[20]Mr. Doherty and other witnesses, including the British government's, testified at length. See Matter of Doherty, 599 F.Supp. 270; J.A. 109-190; C.A. App. 712-943. The hearing record and just some of the exhibits ran to seven volumes. United States v. Doherty, 786 F.2d at 494.

with "the kind of paramilitary terrorism that has become the plague of the modern age." Matter of Doherty, 599 F.Supp. at 274 and 275 n. 4.

Attorney General Thornburgh pronounced the correct analytical framework to be the two-pronged test articulated in McMullen v. INS, 788 F.2d 591 (9th Cir. 1986). The Attorney General accepted that a crime is political where there is a close and direct causal link between the crime committed and its alleged political purpose and object and it is not disproportionate to the objective or of an atrocious or barbarous character. Pet. App. 84a. On the basis of purported application of this test, the Attorney General arrived at his conclusion that Mr. Doherty had committed serious nonpolitical crimes and was therefore ineligible for withholding of deportation. See 8 U.S.C. 1253(h)(2)(C).

By contrast, in determining that Mr. Doherty's conduct constituted political crimes, and in their most classic form, Judge Sprizzo employed a mode of analysis in actuality more searching than Attorney General Thornburgh's. Judge Sprizzo measured Mr. Doherty's conduct as against a dozen criteria. They were substantially more rigorous than the two the Attorney General used, and Judge Sprizzo's analysis, in any event, encompassed both of the criteria the Attorney General deemed significant.

The judge considered: (1) whether the nature of the act was violative of any international law or (2) inconsistent with international standards of civilized conduct; (3) the context in which the act was committed; (4) the status of the party who committed the act; (5) the nature of the organization on whose behalf the act was

committed, including its structure and its mode of internal discipline; (6) the particularized circumstances of the place where the act took place; (7) whether the act was such as to cause indiscriminate death or injury or damage or (8) was directed either against civilians or civilian representatives of the government or (9) was committed in a place other than the territory where political change was to be effected; (10) whether any facts established that hostages were killed or injured; (11) whether the principles embodied in the Geneva Convention were violated; and (12) whether there was any evidence that the act was committed for personal reasons. He concluded, inter alia, that Mr. Doherty's offenses were neither violative of international law nor inconsistent with international standards of civilized conduct. Matter of Doherty, 599

F.Supp. at 274-277.

Given the posture of this case, Judge Sprizzo's decision that Mr. Doherty's offenses were indisputably political cannot be other than dispositive of the political crime issue in the immigration proceeding. It is the only decision rendered on the basis of a fully-developed factual record, pursuant to an evidentiary hearing. Absent the hearing ordered by the BIA, it must here control.

The petitioner offers no adequate reasons why it should not. Its assertion that the decision is erroneous (Petitioner's Reply Brief at 7) is utterly unsupported by reference to any case suggesting that the decision is in any way flawed. McMullen v. INS, 788 F.2d 591, the case on which petitioner rests its political crimes argument, itself acknowledges extradition law's political offense concept

to be the "nearest analogy" to the political crime concept in immigration law. Id. at 595; see also Helton, "Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony," 1 Geo. Imm. L. J. 457 (1986) (decision whether to grant asylum in the U.S. to an alien who has been convicted of a crime is the counterpart of political offense exception to extradition).

If not dispositive, the decision of Judge Sprizzo, as the reasoned conclusions of a judge passing on an essentially identical issue, provides serious reasons for considering that Mr. Doherty has not committed a serious nonpolitical crime. Yet, in the face of this diametrically-opposed decision, the Attorney General peremptorily resolved the serious nonpolitical crimes issue against Mr. Doherty.

The Second Circuit was correct that

he abused his discretion in doing so: in these circumstances, the need for a hearing was "obvious," as was the need for a fully-developed record. Pet. App. 16a-17a. Instead, the Attorney General pretermitted the hearing, thus prematurely and improperly discrediting key elements of Mr. Doherty's claim and simultaneously depriving him of any opportunity to establish that the exclusion grounds relied on by the Attorney General do not apply. Sakhavat v. INS, 796 F.2d 1201, 1204-1205 (9th Cir. 1986); 55 Fed. Reg. 30,683 (to be codified at 8 C.F.R. 208.16(3)) (1990) (if evidence indicates there are serious reasons for considering that the applicant committed serious nonpolitical crimes, "the applicant shall have the burden of proving by a preponderance of the evidence that such ground[] do[es] not apply."). The Attorney General thoroughly abused his

discretion in doing so, for, as the Second Circuit recognized, "[e]xamination of a fully-developed record is a necessary precursor to the fair resolution of Doherty's claim[.]" Pet. App. 17a.

Implicitly acknowledging that the evidence of record does not in fact provide basis for his determination that Mr. Doherty committed serious nonpolitical crimes, Attorney General Thornburgh declared him statutorily ineligible because "there is substantial evidence that PIRA has committed terrorist activities directed at innocent civilian populations" and "[t]hese 'random acts of violence' against civilians constitute serious nonpolitical crimes.'" Pet. App. 95a.

In Patterns of Global Terrorism: 1988, the State Department report cited by the Attorney General (Pet. App. 84a) and by petitioner, terrorism, as per "the

definition commonly used by the US government for the past 20 years," is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets[.]" U.S. Dep't of State, Patterns of Global Terrorism: 1988 v (1989). The definition of terrorism in the document petitioner views as authoritative,[21] when applied to this record, does not yield "substantial evidence that the [IRA] has committed terrorist activities directed at innocent civilian populations," notwithstanding the Attorney General's assertion to the contrary. Pet. App. 65a. The record in this case establishes that it is the policy of the IRA not to engage in acts of violence directed against civilian populations, that the principal targets of its military operations are the crown forces and the paramilitary police, and that attacks on economic targets are preceded by warnings in order that civilian casualties are avoided. See J.A. 114-116, 138-140, 142-143, 168-169.

[21]According to the petitioner, the report establishes that the United States "officially classifies" the IRA as a terrorist organization. Petitioner's Brief at 41. The report also "officially classifies" the African National Congress (ANC) the same way. U.S. Dep't of State, Patterns of Global Terrorism: 1988 82. Nelson Mandela, the leader of the "terrorist" ANC, was received by President Bush at the White House and addressed a joint session of Congress after his release from prison in 1990. N.Y. Times, June 26, 1990, at A1, col. 1; N.Y. Times, June 27, 1990, at A11, cols. 1-6.

The Attorney General pointedly disregarded this evidence of record, and the import of Judge Sprizzo's determination, in favor of the decision--and the record--in an unrelated case to which the respondent was not a party. The Attorney General stated that "the '[IRA's] random acts of violence ... are 'exhaustively documented in the record' of the McMullen

case." Pet. App. 85a n. 46 (at p. 86a).

The Attorney General cannot base a determination about Mr. Doherty's eligibility on "facts" that are not about his conduct,[22] that are not evidence of record, and that are based on "evidence" alleged to be of record in an unrelated proceeding to which the respondent was not a party. Attorney General Thornburgh was obliged to base his decision as to Mr. Doherty's fate on the record in Mr. Doherty's case. The statute imposes this elemental requirement. Section 242(b), 8

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[22]Testimony about every aspect of Mr. Doherty's conduct--including every aspect of it the petitioner claims probative of the serious nonpolitical crimes issue--was heard by Judge Sprizzo. Had Mr. Doherty's conduct been infected by any elements of nonpolitical crime, the restrictive manner in which Judge Sprizzo defined political offenses would have precluded a ruling in the respondent's favor. See J.A. 114-123, 138-140, 142-143, 146-149, 153, 156-158, 163-189; C.A. App. 736, 748, 759-760, 843-844, 928-929.

U.S.C. 1252(b) (Supp.). The Attorney General disregarded it.

His finding of statutory ineligibility was not grounded on the adjudicative facts in this record. "Adjudicative facts are the facts about the parties and their activities[,]" and they " ... answer the questions of who did what, when, where, how, why, with what motive or intent[.]" Zamora v. INS, 534 F.2d 1055, 1062 n. 4 (2d Cir. 1976); 2 Davis, Administrative Law Treatise Section 12.3, at 413 (2d ed. 1984).

The Attorney General admittedly based his decision about Mr. Doherty on adjudicative facts said to be in the McMullen record. McMullen is an unrelated proceeding involving different parties and different issues. Such "proof" as McMullen may have offered was offered to establish that the IRA sought to punish him as a

traitor.[23] It cannot be used to establish that Mr. Doherty is ineligible for withholding of deportation. The determination as to Mr. Doherty's entitlement to the relief sought must be made on the basis of evidence of record in this case, not in McMullen. See Matter of Dass, Int. Dec. #3122 (BIA 1989) (applications "must be evaluated based on matters of record, i.e., ... the evidence introduced by the parties to the case under consideration").

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[23]McMullen based his claim on the allegations that he was in danger of persecution from the IRA and from the police in Ireland. Matter of McMullen, 17 I. & N. Dec. 542, 543 (BIA 1980). The evidence he put forward as to the nature of the IRA necessarily portrayed the organization as unfavorably as possible. Neither McMullen nor the INS had any incentive to depict the IRA other than unfavorably, nor did either have any incentive "fully and vigorously" to litigate the issues central to this litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-333 (1979). Under these circumstances, the Second Circuit was correct that the need for individualized factfinding in the context of Mr. Doherty's case was obvious. Pet. App. 16a.

Attorney General Thornburgh asserted he "need not determine that respondent had committed any of [the] unprotected crimes [.]" He felt it sufficient to state that the IRA had, and Mr. Doherty could thus be found ineligible. Pet. App. 85a. This misreads the statute.

An alien cannot be precluded from withholding of deportation except when there are serious reasons for considering that the alien committed serious, non-political crimes. 8 U.S.C. 1253(h)(2)(C). Relief as fundamental as withholding of deportation cannot, consistent with the Convention, be withheld on the basis of surmise about the applicant's conduct and activities. The petitioner's argument is contrary to the requirement that the exclusion clauses, of which 8 U.S.C. 1253(h)(2)(C) is one, must be restrictively interpreted and applied. Indeed, the Hand-

book of the Office of the United Nations High Commissioner for Refugees, acknowledged by this Court to provide "significant guidance" as to our obligations under the Protocol, contains the admonition that "due to their nature and the serious consequences of their application to a person in fear of persecution, the exclusion clauses should be applied in a restrictive manner." UNHCR Handbook 42 para. 180 and see also 35 para. 149; INS v. Cardoza-Fonseca, 480 U.S. at 439 n. 22.

The Attorney General arrived at his decision denying withholding in a manner inconsistent with the international law mandate underlying the withholding provision. Before determining whether an applicant who has "resorted to force or committed acts of violence" might fall within the exclusion for serious nonpolitical crimes, the Handbook counsels the de-

cisionmaker first to determine whether the individual comes within the scope of the Convention's inclusion clauses. UNHCR Handbook 41-42 paras. 176-177. Only then is the decisionmaker positioned to make a properly informed decision as to whether the applicant is rendered ineligible by one or more exclusion clauses. In determining whether an offense is a serious nonpolitical crime, "all the relevant factors--including any mitigating circumstances--must be taken into account." If the offense is found to be nonpolitical, the nature of the offense still must be balanced against the degree of persecution feared by the individual seeking protection. Id. at 37 paras. 156-157. The commission of political crimes which involve violence or the use of force is not basis for being denied relief, except in

the case of acts of an atrocious nature.[24] The decisionmaker must carefully examine the nature of the act, the applicant's motives in committing the act, and the link between the act and its alleged political purpose. UNHCR Handbook 36 paras. 151-152, 41 para. 176.

Attorney General Thornburgh resolved the issues underlying the serious nonpolitical crimes determination without attention to these controlling considerations. His determination on the issue of serious nonpolitical crimes was thoroughly flawed from start to finish, a function of his tortuous effort to evade the decision of Judge Sprizzo and thus clear the way for Mr. Doherty's delivery to the British government. The Attorney General may not so

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[24]Judge Sprizzo's careful analysis determined there were no such acts here. See pp. 62-63 supra.

blatantly disregard judicial decisions with which he disagrees. Here, the existence of an authoritative decision, which embraced conclusions in fundamental opposition to his, should, at the very least, have signaled the need for a hearing at which the points of divergence could have been fully developed in an adversarial context.[25]

The Attorney General also determined that Mr. Doherty is ineligible for withholding, pursuant to 8 U.S.C. 1253(h)(2)(A), because of "participation in the PIRA's persecution of political oppon-

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[25]Given the existence of the Sprizzo decision, the Attorney General's decision to here pretermit any hearing was unjustifiable. Further, the most recently-enacted regulations make clear that an applicant is entitled to an evidentiary hearing on the issues implicated by the conduct upon which the denial--whether mandatory or discretionary--is based. See 55 Fed. Reg. 30,683, 30,684 (to be codified at 8 C.F.R. 208.13(c), 208.14(b), 208.16(c)(3) (1990).

ents." Pet. App. 89a. Understandably, the petitioner does not argue seriously the propriety of this branch of the Attorney General's decision. It suffers from the same flaws as the determination made pursuant to 8 U.S.C. 1253(h)(2)(C).

Evidence in the McMullen record arguably establishing that the IRA has engaged in acts of persecution is not evidence of record in this proceeding, nor is it probative of whether Mr. Doherty personally engaged in acts of persecution. The most recent cases to address conduct in which Mr. Doherty engaged, as established by record evidence, hold that it does not constitute persecution and indeed could not or all members of armed opposition groups would be barred from asylum and withholding. Domestic law does not contemplate that result. Matter of Rodriguez-Majano, Int. Dec. #3088 (BIA 1988)

(Congress did not intend to restrict asylum and withholding only to those who take no part in armed conflict); Matter of Fuentes-Sanchez, Int. Dec. #3065 (BIA 1988) (attacks by guerrillas on police and military are not acts of persecution).

B. The Attorney General cannot deny Mr. Doherty asylum and deport him to the country denied his extradition on the ground that doing so will serve policy interests of the United States.

The policy concerns and foreign relations considerations the petitioner claims this case to implicate are inextricably intertwined with the fact that Mr. Doherty was found to have committed political offenses, as opposed to common crimes. The fact that one has committed political offenses does not deny an asylum applicant the protection of that body of law. The Convention, Protocol, and Handbook, and the Refugee Act of 1980, unambiguously recognize that the political offender is

entitled to protection.[26]

Centuries ago political offenders were routinely handed over to the governments they resisted, because the requested government perceived it to be in their interests to do so. As civilization advanced, however, societies increasingly declined to return failed rebels on the basis of concern about the nature of the treatment offended governments would visit upon them. The concepts of political offense and political asylum came to be uni-

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[26]Convention, 189 U.N.T.S. 150, art. 1(F)(b), reprinted in UNHCR Handbook 60; UNHCR Handbook 20 para. 86, 36 paras. 151-152, 37 paras. 156-157, 41 para. 176; 8 U.S.C. 1101(a)(42) and 1253(h)(2)(C). Even the most recently-implemented asylum regulations, which compel denial of asylum in specific instances, do not compel denial where individuals have committed political crimes, or even, for that matter, serious nonpolitical crimes. 55 Fed. Reg. 30,683 (to be codified at 8 C.F.R. 208.14(b) (1990)). Previously, this had not been the case. See, e.g., 8 C.F.R. 208.8(f)(v) (1989).

versally and inextricably intertwined; they continue to be so to this day. See, e.g., Banoff & Pyle, 16 N.Y.U. J. of Int'l L. and Politics at 169, 178-182; Helton, 1 Geo. Imm. L. J. 457.

The law gradually extended protection to persons who, even if not political offenders, would be subject to persecution if returned to a particular country. The unwillingness to send people to venues where they are at serious risk of persecution has become a firmly-fixed principle of law; Goodwin-Gill makes the categorical assertion that "no state today claims any general right to return refugees or bona-fide asylum seekers to a territory in which they may face persecution.[.]" Goodwin-Gill, The Refugee in International Law 99 (1983).

To accomplish the proscribed extradition of one judicially determined to be a

political offender, the petitioner argues that the Attorney General can return an asylum applicant to a country in which he is likely to face persecution when doing so would serve this country's policy interests. This remarkable argument, a direct assault on the core purpose of the Refugee Act of 1980, invites return to a mode of international relations long ago and rightfully abandoned. It cannot be reconciled with the very fact of the passage of the Refugee Act.[27]

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[27]In an effort to justify the extreme position it advances, the petitioner claims that the Second Circuit

> held that the Attorney General's discretion [under Section 208] may only be exercised to promote "administrative fairness and efficiency" and prevent procedural "abuses" in the asylum system.

Petitioner's Brief at 19. The Second Circuit held no such thing. It merely observed that the BIA's discretionary denials of asylum had been "primarily for

The Second Circuit held that the Attorney General exceeded his discretion when he denied Mr. Doherty's application for asylum on the basis of policy concerns relied on by Attorney General Meese in disallowing Ireland as the respondent's designated country of deportation. Pet. App. 26a. The court placed appropriate emphasis on the history and purpose of the legislation. Guided by this Court's decision in INS v. Rios-Pineda, 471 U.S. 444, 451-452 (1985), the Second Circuit recognized that the discretion available to be exercised by the Attorney General pursuant to Section 208(a), 8 U.S.C. 1158(a), is circumscribed by "the 'legitimate concerns' of the relevant statutory provision." Pet. App. 18a. The court examined the legislative history and found it sig-

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reasons of administrative fairness and efficiency[.]" Pet. App. 24a.

nificant that Congress chose to define "refugee" in a politically neutral manner. Pet. App. 21a. The court also noted that by passing the Refugee Act, Congress was purposefully limiting the Attorney General's discretion. Id.

The petitioner predicates its argument on a negative: nothing in Section 208 says the Attorney General may not deny asylum to an eligible individual on the basis of "foreign policy concerns." Petitioner's Brief at 20. This superficial argument ignores several significant points. First, nothing in Section 208 says the Attorney General can consider foreign policy interests. Conversely, Section 207(e)(6) specifically identifies foreign policy interests as a factor to be considered when presidential representatives consult with members of Congress to establish annual plans regarding the over-

all ceilings and origins of refugees to be admitted from abroad. 8 U.S.C. 1157(e)(6). Second, the Refugee Act itself was legislative embodiment of the humanitarian principles contained in the Convention and Protocol and is therefore incapable of being construed in the manner suggested by the petitioner.

The concerns which animated the enactment of these refugee treaties were profoundly humanitarian. Were it otherwise, they would not have come into existence at all. Their purpose was to protect and assist refugees. The concept of asylum is an outgrowth of the same protection-oriented concerns the refugee treaties embody, and therefore asylum decisions are to be rendered in the same humanitarian fashion. UNHCR Handbook 3 para. 1, 7 para. 25.

Congress enacted the Refugee Act to

bring domestic law into conformity with the Convention and Protocol. INS v. Cardoza-Fonseca, 480 U.S. at 436. The statutory purpose of protecting refugees is abrogated utterly if the grant of discretion conferred upon the Attorney General can be read to encompass unconstrained authority to consign selected refugees to persecution in the interests of political expediency. The Attorney General's decision, expressly grounded in just such an interpretation of Section 208, fundamentally contravenes the purpose of the statute and is therefore an abuse of discretion. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) ("agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"); Manhattan General Equipment

Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936) (power to administer statute is confined to effecting will of Congress and conduct out of harmony with the statute is a nullity). Indeed, this Court cautioned that when scrutinizing administrative decisions, reviewing courts "must not 'rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' (citations omitted)." Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983).

Section 207 is neither "closely related" to Section 208, as the petitioner contends, nor does it in any way "confirm" that the Attorney General has discretion so broad that he can deny an individual applicant asylum on the basis of policy considerations. Petitioner's Brief at 20.

Section 207 deals with the decisionmaking process governing the admission of refugees from abroad. Given its scale and inherent selectivity, this exercise necessarily implicates foreign policy considerations in a way that adjudicating individual asylum applications under Section 208 does not and must not.

Prior to the Refugee Act of 1980, the Attorney General's discretion had been exercised in a manner accurately described as freewheeling, a situation with which Congress grew increasingly dissatisfied. See generally Anker & Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," 19 San Diego L. Rev. 9, 19, 30-64 (1981). With its enactment, the terrain was significantly altered. The parole power, which, as used by the Attorney General to bring in refugees from abroad, had functioned as an "unstated,

hidden, and ad hoc refugee admission policy," was rigorously circumscribed. Id. at 19; 1 Gordon & Mailman, Immigration Law and Procedure Section 2.04[7] at 2-25. Withholding of deportation, which had been discretionary, became mandatory. Asylum was for the first time given a statutory foundation[28] and was to be granted on the basis of individualized determinations divorced from geographic and political considerations. INS v. Cardoza-Fonseca, 480 U.S. at 427, 429, 435.

The Refugee Act required that uniform asylum procedures be formulated, and with the regularization of the asylum process and the constriction of the parole power, it carefully removed nonhumanitarian con-

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[28]The predecessor to Section 208 was a regulation promulgated by the petitioner in 1975 permitting asylum to be granted in accordance with the Convention. 8 C.F.R. 108.2 (1975).

siderations from the decisionmaking process.[29] Thus, as integral parts of the Refugee Act of 1980, Sections 207 and 208 came into existence specifically to control the discretion of the Attorney General. The petitioner's argument is a bald effort to restore refugee law--and the Attorney General's discretion--to their pre-Refugee Act status. See generally Anker & Posner, 19 San Diego L. Rev. 9 (1981).

The petitioner infers from other sections of the act that the Attorney General's discretion under Section 208 is unfettered. Section 244, 8 U.S.C. 1254, is

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[29]We would respectfully refer the Court to the Brief for Amicus Curiae Office of the United Nations High Commissioner for Refugees and to the Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives for discussion of the humanitarian and nonideological nature of refugee law.

deemed to be particularly instructive. It is not. As opposed to Section 208, which is remedial and protective in essence, Section 244 is restrictive. See, e.g., INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981) (per curiam) (choice by Congress of phrase "extreme hardship" indicative of exceptional nature of suspension remedy).

Section 243(a), 8 U.S.C. 1253(a), also relied on by the petitioner, serves a function quite different from Section 208 and is therefore not a useful referent when defining the scope of his discretion under Section 208.[30] It is most readily understood as a means of departure control and is akin to Part 215 of 8 C.F.R., which

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[30]The Second Circuit recognized the Attorney General's discretion under Section 243(a) to be very broad. Pet. App. 8a-9a. The fact that it did not find his discretion under Section 208 to be as expansive does not establish that it took an impermissibly narrow view of his role in asylum cases.

permits INS officers to prevent any alien whose departure would be "prejudicial to the interests of the United States" from leaving the country until a hearing is held. 8 C.F.R. 215.1 et seq. (1990 ed.).

Measured against the legislative history, and against the other sections the petitioner claims to be relevant, the interpretation of Section 208 the petitioner advances fundamentally contradicts the principles that are the bedrock of the Convention and Protocol and thus of the Refugee Act itself. That body of law affords relief to those who are refugees because they are in need of protection. The Attorney General's effort to recast the law so as to be able here to accomplish the extradition to an ally of one who has been recognized as a political offender is an effort utterly at odds with the concept of providing protection to

those who are at risk.[31] Decisions as to

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[31]The history of the political offense exception provision richly documents the fact that political offenders were thought to be at very great risk of political persecution if asylum countries acceded to requests for their return. To insure that decisions of such magnitude were untainted by considerations of political expedience, they have been pointedly withheld from the executive branch. Matter of Mackin, 668 F.2d 122, 133-134 (2d Cir. 1981). Even as between the United States and the United Kingdom, Congress's concern about the persecution of political offenders remains undiminished, a fact evidenced by the supplementary treaty's express abrogation of the rule of noninquiry. See S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. 16 (art. 3(a)) (1986). If policy-related concerns do not outstrip persecution-related concerns in extradition proceedings, which act upon international relations with more immediacy than immigration proceedings, there is no persuasive basis for petitioner's argument that in the immigration context, refugees can permissibly be returned to persecution for reasons of political expediency. Cf. Matter of Mackin, 668 F.2d at 133 (decisions on the political offense exception can cause difficulties in foreign relations; unless decisionmaking remains with judicial branch, the political offense exception would be eviscerated "with nations with which we are allied or whose favor we especially desire"); McMullen v. INS, 788 F.2d at 596 (all the United States seeks in deporting an individual whose extradi-

whom protection will be afforded are to be the product of individualized adjudications, untainted by bias or parochial considerations. See Convention, 189 U.N.T.S. 150, art. 3, reprinted in UNHCR Handbook at 60; UNHCR Handbook 12 para. 39, 48 paras. 201-202. If the Refugee Act is construed to permit some refugees to be singled out and denied asylum on the basis of the state's policy interests, then the statute's protective function, and the attendant emphasis on nonideological decisionmaking, becomes illusory, and protection is jeopardized for all other refugees.

The petitioner purports to find support for its position in decisions of this Court. Yet, the isolated sentences from

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tion has been denied is to expel him from U.S., and in doing so, should take care not to "'interfere with any internal struggle' (citation omitted)").

Cardoza-Fonseca and Stevic on which it places such weight merely state the unexceptionable propositions that withholding of deportation is mandatory, asylum is not, and an individual who is eligible for asylum may be granted or denied it in the discretion of the Attorney General. INS v. Cardoza-Fonseca, 480 U.S. 421; INS v. Stevic, 467 U.S. 407. This Court has never, however, addressed the issue of the scope of the Attorney General's discretion in matters of asylum.

By citing dicta about the power of the executive branch in immigration matters or about an interconnection between immigration decisions and foreign policy (Petitioner's Brief at 26-27 and n. 12), the petitioner demonstrates there is no support in the case law for the aberrant position it advances. No court has, in the 11-year history of the Refugee Act,

held, or observed in dictum, or even intimated, that the Attorney General can permissibly deny asylum to an individual who has established a prima facie case of persecution and then return him to a country where he is in danger of persecution in order to advance this country's policy interests.

By its conduct, the executive branch has effectively repudiated its own argument. When lobbying for the excision of the political offense exception from the U.S.-U.K. treaty of extradition, Abraham Sofaer, legal advisor to the State Department, told Congress it need not hesitate to do away with the provision, because "even though the political offense exception will not be applicable, the asylum doctrine will be[.]" Hearing on the Impact of the Supplementary Treaty before the Subcomm. on the Constitution of the

Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 80. The "asylum doctrine" is not "applicable," however, if the Attorney General withholds asylum from those he chooses to sacrifice for reasons of state. Further, the Departments of Justice and State recently settled a major lawsuit that mounted "systemic challenges to the processing of asylum claims" on the basis of a stipulation that provides that "under the new asylum regulations as well as the old" "foreign policy ... considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." They stipulated that other irrelevant factors were whether the individual is from a country whose government the United States supports or with which it has favorable relations and whether the United States agrees with the political or ideological

beliefs of the asylum seeker. See American Baptist Churches v. Thornburgh, 760 F.Supp. 796 (N.D. Cal. 1991).

The American Baptist Churches ("ABC") stipulation illuminates the weakness of petitioner's "foreign policy concerns" argument. The language of the stipulation is itself tacit admission that the Second Circuit interpreted the Refugee Act correctly when it held that foreign policy and other geopolitical considerations are not relevant to the determination of asylum applications.

The circuit court's decision articulates the very interpretation of asylum law the executive branch has bound itself to respect. It matters not that the ABC stipulation speaks in terms of determining whether an individual is eligible for asylum, as opposed to whether he or she will be granted asylum. It is bizarre and

cynical to argue that, ABC notwithstanding, a refugee can be denied asylum on the basis of foreign policy considerations that could not permissibly be considered even in making the threshold determination of whether the individual is eligible for asylum.[32]

Section 208(a) was expressly enacted to accomplish a humanitarian result, and it cannot, consistent with that purpose, be construed to countenance discretionary denials of asylum in those instances where the Attorney General deems them to be in the interests of the state. To so interpret the Attorney General's discretion under Section 208 would lead to consequences starkly disconsonant with the protective purpose of the statute. INS v. Phinpath-

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[32]Nonetheless, the petitioner does so argue. See Petitioner's Reply Brief at 3-4.

ya, 464 U.S. 183, 198 (1984) (Brennan, J., concurring) (when construing statute, general terms must be limited in their application so as not to lead to injustice, oppression, or absurd consequence); INS v. Errico, 385 U.S. 214, 225 (1966) (in construing immigration statute, especially one designed to accomplish a humanitarian result, must be mindful of humanitarian purpose and resolve doubt in favor of alien).

Finally, the most recent asylum regulations enacted specify a number of grounds on which asylum must be denied and a number of grounds on which it can be denied. Nothing in them, or in earlier regulations, suggests that foreign policy concerns are a factor properly considered when deciding whether to deny asylum in an

exercise of discretion.[33] The regulations make express that asylum is a protection-oriented process "distinct from the normal operation and administration of the immigration process" and that its grant must be guided by humanitarian considerations. 55 Fed. Reg. 30,674 (1990). Returning a human being to a country where he is likely to be persecuted because not to return him might disadvantage this country's relations with a foreign government is an act incapable of being described as "humanitarian."

III. THE BIA AND THE SECOND CIRCUIT WERE CORRECT THAT REOPENING WAS WARRANTED.

The denial of the petitioner's motion

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[33] See, e.g., 8 C.F.R. 208.8(f) (1989); 55 Fed. Reg. 30,683 (to be codified at 8 C.F.R. 208.14(b), (c) (1990)). Even the earliest asylum regulations, enacted pursuant to United States accession to the Protocol, expressly acknowledged the protection function by linking asylum applications to the Convention. 8 C.F.R. 108.2 (1975).

to reopen cannot properly be evaluated apart from the history of the proceedings that have gone before. On every occasion, Mr. Doherty has prevailed before the Attorney General's delegatees. The petitioner had been unable to prevail until the Attorney General entered the case and reversed decisions in Mr. Doherty's favor. The Attorney General rarely ever renders a decision in an immigration case. Pet. App. 28a. In no case other than this one has he done so twice. Further, his decision broke with past practice in another significant particular in that he heavily immersed himself in resolving mixed questions of fact and law.[34]

Both the Second Circuit and the BIA

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[34]There have been only eight published decisions by the Attorney General in the past two decades. They are referenced in the Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives.

agreed that the case fully justified reopening and that Mr. Doherty had met and satisfied all the requirements imposed by the regulations. Pet. App. 11a-28a, 93a-100a, 108a-115a. Both were sensitive as well to the fact that the case had a unique history. In the context of reopening, that fact bears special weight, as this Court has recognized. Although reopening is discretionary, that discretion is abused when reopening is denied despite submissions revealing the case to be "particularly unusual." See INS v. Jong Ha Wang, 450 U.S. at 144, 145.

The Attorney General's decision denying reopening impermissibly ignored that this is a "particularly unusual" case. The Attorney General knew it to be such. The BIA's earlier decisions had taken note of its remarkable history, and Attorney General Thornburgh was of course aware

that his predecessor had already rendered one decision in the case.

Nothing in the history of this case or in Mr. Doherty's motion to reopen justifies the Attorney General's punitive application of the reopening regulations. In defending it, the petitioner argues principally that the Extradition Act 1987 was not a material change in the law of Ireland, and even if it was, it was immaterial because Mr. Doherty's designation of Ireland had been disallowed.

To discount the factual and legal significance of the Extradition Act's implementation, the Attorney General refused to give proper weight--or indeed any weight--to the portions of the regulations which make reopening available "on the basis of circumstances which had arisen subsequent to the hearing." 8 C.F.R. 3.2 (1990); see also 8 C.F.R. 242.22 (circum-

stances have arisen after the hearing "on the basis of which the request is made"). The Extradition Act 1987 did not become effective until December 1, 1987, more than 14 months after the order of deportation was entered. Its implementation on that date is unarguably a circumstance that arose subsequent to the hearing.

The petitioner also urges that the Extradition Act 1987 was not a material change in Irish law because its "primary effect" was "to provide an express statutory basis for extradition" where political offenses were involved. Petitioner's Brief at 47. There had previously been no statutory basis for extradition in those circumstances, and further, the legislation which had previously controlled, the Extradition Act 1965, provided that "[e]xtradition shall not be granted for an offence which is a political offence or an

offence connected with a political offence." Clearly, the implementation of the Extradition Act 1987 did work a dramatic and material change in Irish law. Compare Extradition Act 1965, No. 17, sections 11(1) and 50(2) (1965) with Extradition Act 1987, section 3 (J.A. 97-99).

Alternatively, the petitioner argues that since Attorney General Meese's order foreclosed deportation to Ireland, any change in Irish law was irrelevant. The Extradition Act was powerfully relevant, however, on December 3, 1987, the day on which the motion to reopen was filed. The immigration judge's order of September 19, 1986, directed that Mr. Doherty be deported to Ireland. The Meese order directing deportation to the United Kingdom would not issue until a full six months later. Thus, on the date the motion to reopen was

filed, a change in Irish law that guaranteed subsequent extradition to the United Kingdom pursuant to Mr. Doherty's deportation to Ireland was not dismissable as irrelevant. The prospect of indirect but certain "return"[35] to the country where one will be persecuted is no less a ground for relief than deportation directly to a country where one will be persecuted. See Amanullah v. Cobb, 862 F.2d 362, 367 (1st Cir. 1988).

When the Meese order did issue, the prospect of persecution in the United Kingdom became even more immediate. The respondent's fear of persecution upon return to the United Kingdom had prompted

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[35]Section 243(h)(1) does not speak simply in terms of proscribing deportation. Rather the Attorney General "shall not deport or return any alien ... to a country" where his/her life or freedom would be threatened. 8 U.S.C. 1253(h)(1) (emphasis added).

him immediately to file an application for asylum within days of being taken into custody in 1983. That same fear prompted him to file his motion to reopen within days of the implementation of the Extradition Act. At the time the motion was filed, the entering into effect of the Extradition Act was indisputably a legally sufficient basis for filing a motion to reopen in order to pursue relief that would bar his return--directly or indirectly--to the United Kingdom.

That an order subsequently issued requiring Mr. Doherty's deportation directly to the very country where he feared persecution meant only that the circumstance that had occasioned the filing of the motion--the implementation of the Extradition Act 1987--itself receded in significance. The issuance of the Meese order, however, which directed his deportation to

the United Kingdom and reversed the order directing his deportation to Ireland, made the need for the relief sought through the motion all the more acute. Mr. Doherty had filed the motion to protect against being returned indirectly to the country where he feared persecution; Attorney General Thornburgh denied the motion because Attorney General Meese's order insured Mr. Doherty's direct return to the country where he feared persecution.

The Attorney General's decision is an exercise in sophistry, not reasoned decisionmaking, and it is best understood as the consummation of the unprincipled and failed eight-year effort "to get Doherty to the United Kingdom." See p. 3 supra. The decision itself, the tortuous course of these proceedings, and the many other decisions in the respondent's favor demonstrate why Joseph Doherty must be afforded

the hearing the Attorney General would have him denied.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed and the case remanded for further proceedings consistent with the court's opinion.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent and his amici all but ignore the central features of this case. Respondent is a member of the Provisional Irish Republican Army (PIRA), a terrorist organization. He was convicted of possessing explosives in connection with his PIRA activities and of murder and related crimes in the United Kingdom in 1980. Respondent then engineered an armed escape and entered the United States illegally as a fugitive in 1982. At his deportation hearing, respondent waived his right to apply for asylum and withholding of deportation, and sought to be deported immediately to Ireland—before the effective date of a Supplementary Treaty that subjected him to extradition from the United States to the United Kingdom. In a complete about-face, respondent now seeks to have his deportation proceedings reopened and to apply for the special relief (asylum and withholding of deportation) he previously waived. In response to this attempt

to manipulate the administrative process, the Attorney General properly concluded that enough is enough.

First, respondent identifies no changed circumstances warranting the extraordinary remedy of reopening. *Second*, nothing in the text or background of Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. 1158 (a), barred the Attorney General from considering this Nation's opposition to terrorism and related foreign policy concerns in deciding that respondent should be denied asylum in any event. *Third*, Judge Sprizzo's conclusion in 1984—which we think was gravely wrong—that respondent's offenses were "political" (and therefore did not subject him to extradition) has been overruled by the Supplementary Extradition Treaty with the United Kingdom.

I. All else aside, Attorney General Thornburgh did not abuse his discretion under applicable regulations and *INS* v. *Abudu*, 485 U.S. 94, 104-111 (1988), by denying respondent's motion to reopen on the ground that he did not identify any new evidence or changed circumstances that warranted that special remedy. Pet. App. 62a-78a. Respondent relies (Br. 101-110) solely on the Extradition Act that became effective in Ireland on December 1, 1987. Section 3 of that Act lists offenses (including those involving automatic firearms and hostage-taking) that will not be regarded as political crimes within the meaning of Ireland's Extradition Act of 1965. J.A. 97-98. In respondent's view, the 1987 Act made it clear that if he was deported to Ireland, he would, in turn, be extradited to the United Kingdom. Respondent's reliance on the 1987 Act is fundamentally flawed.

Under Attorney General Meese's decision of June 9, 1988 (which the Second Circuit sustained and respondent does not challenge), respondent is to be deported to the United Kingdom, not Ireland. As a result, any change in *Irish* law is simply immaterial. Pet. App. 74a. It is true, as respondent points out (Br. 106-107), that when he filed his motion to reopen on December 3, 1987, the BIA had

approved his designation of Ireland and ordered him deported to that country. But respondent fails to note that approximately one month before he filed his motion to reopen, Attorney General Meese had granted the INS's request to review the BIA's order. Attorney General Meese thereafter reversed the BIA's decision and ordered respondent deported to the United Kingdom. It was only after Attorney General Meese's order that Attorney General Thornburgh ruled on respondent's motion to reopen. At that point, it was hardly an abuse of discretion for Attorney General Thornburgh to conclude that any change in Irish law was no longer material (even assuming that it once was), and hence did not warrant reopening of the deportation proceedings. Respondent in fact concedes (Br. 108) that the 1987 Extradition Act "receded in significance" at that point.[1]

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[1] Respondent asserts (Br. 109) that the Meese decision "made the need for the relief sought through the motion [to reopen] all the more acute," since it "insured [respondent's] direct return to the country where he feared persecution." But he does not argue that the Meese decision itself warranted reopening. See Br. in Opp. 9-10, 16-17.

Amicus ACLU does contend (Br. 11-13) that the Meese decision required reopening. Attorney General Thornburgh correctly rejected that notion. Pet. App. 65a-67a. Respondent was aware of the INS's opposition to his designation of Ireland (and of the interest in that question at the "highest levels of government") when he waived his right to apply for asylum and withholding of deportation on September 12, 1986, which was *before* the immigration judge ordered him deported to Ireland on September 19, 1986. *Id.* at 66a, 156a-159a; J.A. 32. Attorney General Meese's rejection of respondent's designation was nothing more than the final decision in the same proceeding. As Attorney General Thornburgh explained, if an adverse final decision were sufficient to require reopening (especially to allow the alien to apply for relief he previously waived), "there could never be finality" and "the regulatory process could be manipulated at will." Pet. App. 67a, 81a. The ACLU objects (Br. 12-13) that the result will be to require an alien who wants to avoid deportation to a country where he fears persecution to both request deportation to a third country and apply for asylum and withholding of deportation. But all issues concerning the alien's deportation *should* be resolved in a single proceeding. Although in this case the

Quite apart from Attorney General Meese's order, a change in *Irish* law could have no bearing on any request by respondent, under Section 243(h) of the Act, 8 U.S.C. 1253(h), for withholding of deportation to the *United Kingdom*. That Section bars deportation to a particular country if the Attorney General finds that the alien's life or freedom would be threatened "in such country" for a prohibited reason. Respondent has alleged that he would be persecuted in the United Kingdom. Before the Meese decision, as after, Irish law was irrelevant to a claim that the Attorney General should not deport him to "such country." [2]

Moreover, Attorney General Thornburgh found, after thorough analysis, that the 1987 Act did *not* materially increase the likelihood that respondent would be extradited from Ireland to the United Kingdom, because the "political offense" exception under the 1965 Irish Extradition Act had already been significantly narrowed by judicial construction. Pet. App. 70a-73a. Respondent makes no effort to refute this conclusion. See Resp. Br. 106-107. Significantly, moreover, the Attorney General noted that when respondent waived asylum and withholding of deportation and sought to be deported to Ireland, respondent himself argued that " 'decisions of the Irish Supreme Court are viewed as having vitiated the political offense exception [in the 1965 Irish Extradition Act], thereby removing any obstacle to respondent's extradition from Ireland to the United Kingdom. *See, e.g., McGlinchey* v. *Wren*, 3 Ir. L. Rep. Monthly 169 (1982) [[1982] I.R. 154].' " [3] Even if respondent were now able to show that the 1987 Act did substantially change Irish law, that change would be immaterial in *this* case, since even prior to the 1987 Act, respondent represented (and therefore presumably believed) that he was already subject to extradition from Ireland to the United Kingdom, but nevertheless sought to be deported to Ireland.

Finally, respondent does not dispute the Attorney General's finding that even if the 1987 Act did marginally increase the risk that he would be extradited from Ireland to the United Kingdom, that consequence was entirely foreseeable when respondent designated Ireland as the country of deportation. Ireland had committed itself in the Anglo-Irish Agreement of November 15, 1985, to accede as soon as possible to the European Convention on the Suppression of Terrorism (which excluded the same offenses from the category of "political" crimes), and it signed the Convention in February 1986—more than six months *before* respondent waived his right to apply for asylum and withholding of deportation in an effort to be deported immediately to Ireland. Pet. App. 67a-68a. Nor does respondent dispute the Attorney General's conclusion that the foreseeability of any change in Irish extradition law weighed against reopening because it confirmed that respondent had assumed the risk that "the move then underway to obtain ratification of Ireland's treaty with the United Kingdom would prove successful." *Id.* at 80a.[4]

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circumstances warranted rejection of respondent's designation of Ireland, INS presumably would promptly agree to the alien's designation in the absence of such circumstances.

[2] But cf. *Amanullah & Wahidullah* v. *Cobb*, 862 F.2d 362, 367-368 (1st Cir. 1988). Respondent's claim to the broader relief of asylum of course was also predicated on an alleged threat of persecution in the United Kingdom, not Ireland. For this reason, any change in Irish extradition law was likewise immaterial to the underlying basis for his asylum claim even before the Meese decision.

[3] Pet. App. 70a-71a (quoting respondent's brief to the BIA); see also *id.* at 70a n.25, 71a; *Shannon* v. *Flanning*, [1984] I.R. 569 (Ir. S. Ct.); Connelly, *Non-Extradition for Political Offenses: A Matter of Legal Obligation or Simply a Policy Choice*, 1982 Irish Jurist 59.

[4] Amicus ACLU suggests (Br. 13-14) that if changed circumstances must be unforeseeable, an alien would have to anticipate political developments in a foreign country that would increase the threat of persecution. Because there is no allegation here of such changes in the United Kingdom, the relevance of foreseeability in that setting is not involved. This case presents the distinct question of whether reopening is required by a change in the *law* in a for-

II. Even if the Court disagrees with our first point, the order denying reopening should be sustained on the independent ground that the Attorney General properly decided that respondent would not in any event be granted asylum or withholding of deportation.

A. Respondent does not challenge two of the four factors cited by the Attorney General in deciding to deny asylum—namely, that "respondent knowingly and intentionally waived his claim to asylum," and that "respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, * * * suggest that he is not deserving of equitable relief." Pet. App. 82a. Instead, respondent contends that it was improper for the Attorney General to rely on the other two factors: (1) that deportation of respondent would advance the "important policy" of the United States "that those who commit acts of violence against a democratic state should receive prompt and lawful punishment," and (2) that "the United States Government, through the State Department, has specifically determined that it is in the foreign policy interest of this country that respondent be deported to the United Kingdom." *Ibid.* Respondent is wrong.

1. The humanitarian purposes of asylum itself, as well as the national security interests of the United States and the safety of its citizens, would be undermined if the Attorney General were required to insulate his asylum decisions from consideration of the Nation's opposition to terrorism and the policy that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. Respondent in fact does not contend that Section 208 of the Act itself precluded the Attorney General from considering the murder and related crimes of which respondent was convicted in the United

eign country to which the alien *asked* to be deported. Pet. App. 74a. The Attorney General reasonably concluded that an alien who requests to be deported to a particular country assumes the risk that a foreseeable change in the law will occur there. Cf. *Reed* v. *Ross*, 468 U.S. 1, 12-16 (1984).

Kingdom.[5] Instead, respondent argues (Br. 38-52) that he may be returned to the United Kingdom to serve his sentence for those crimes only by way of extradition, not deportation. See also Int'l Human Rts. Group Br. 34-41. There is no support for that novel proposition. Our immigration laws have long provided for exclusion and deportation of aliens who committed crimes abroad. See 8 U.S.C. 1182(a)(9) (1988) (crimes involving moral turpitude); 8 U.S.C. 1182(a)(2) (criminal and related grounds) and 1182(a)(3)(B) (terrorist activities), as amended by the Immigration Act of 1990, § 601, 104 Stat. 5067, 5069. It has never been suggested that extradition is the only way those aliens may be removed from the United States.

As this Court made clear in the very decision upon which respondent relies (Br. 45, 47), extradition and deportation "are different things, and have different purposes." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 709 (1893). Extradition "is the surrender to another country of one accused of an offence against its laws," to be tried and, if found guilty, punished, *ibid*; it occurs

[5] Section 515 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5053, now *requires* that an alien in respondent's position be denied asylum. It adds a new paragraph (d) to Section 208 to provide that "[a]n alien who has been convicted of an aggravated felony, notwithstanding subsection (a), may not apply for or be granted asylum." The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43) (as amended by the 1990 Act, § 501, 104 Stat. 5048), to mean, *inter alia*, "murder" and "any illicit trafficking in any firearms or destructive devices," including any such offense that violates foreign law. Respondent is not barred by this new provision because the term "aggravated felony" includes only those foreign offenses that were committed on or after the effective date of the 1990 Act. § 501, 104 Stat. 5048. But the fact that Congress has provided that the Attorney General *must* deny asylum applications filed by such aliens in the future reinforces the conclusion that the Attorney General did not err in relying on respondent's convictions for murder and possession of explosives in denying him asylum as a discretionary matter. Compare *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 78 (1957).

only upon a request by the foreign government concerned. Deportation, by contrast, "is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare," *ibid.*; it is not dependent upon a request by a foreign government or the availability of extradition, and it may proceed without regard to whether the alien will be tried or punished abroad. As a result, if an alien is ineligible to remain in the United States under our immigration laws and has been charged with or convicted of a crime in another country that is covered by an extradition treaty, he is subject to *both* deportation and extradition. Otherwise, the United States would be required to tolerate the continued presence of the alien, in violation of the Immigration and Nationality Act, if the foreign government concerned declined to request extradition. The central point of *Fong Yue Ting* is that the power to expel aliens is a fundamental attribute of sovereignty. 149 U.S. at 704-714. That power is not abrogated in this case simply because the foreign government concerned *does* intend to try or punish the alien (or because the United States supports that intention).

Contrary to respondent's contention (Br. 38-39, 42-44, 47-48, 81-82, 92), there is no basis for a different result here because Judge Sprizzo, in 1984, denied an application for a warrant to extradite respondent to the United Kingdom. *In re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). Respondent concedes (Br. 42, 51-52) that Judge Sprizzo's ruling would not bar a judge from entertaining a new request for extradition, since it was not appealable and has no res judicata effect.[6] *A fortiori*, the denial of extradition does not bar the Attorney General from deporting respondent under

[6] See *Collins* v. *Loisel*, 262 U.S. 426, 429-430 (1923); *Hooker* v. *Klein*, 573 F.2d 1360, 1366-1368 (9th Cir.), cert. denied, 439 U.S. 932 (1978); *In re Mackin*, 668 F.2d 122, 130 (2d Cir. 1981); cf. *Bassing* v. *Cady*, 208 U.S. 386 (1908).

the independent authority of the immigration laws. See pages 17-19, *infra*.

2. In concluding that "it is in the foreign policy interests of this country that respondent be deported to the United Kingdom," Pet. App. 82a, the Attorney General relied on the State Department's representations that (1) because "the United Kingdom is the United States' closest partner in our counter-terrorism efforts," a "[f]ailure to return [respondent] to the United Kingdom could undermine [that government's] confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern," and (2) "given the strength of British views on this issue," it "might well prejudice broader aspects of our bilateral relationship." *Id.* at 126a-127a. To state the obvious, terrorism is inimical to the humanitarian premises underlying a grant of asylum; it therefore would be contrary to the purposes of the Refugee Act if the Attorney General were required to ignore the possibility that a discretionary grant of asylum to a convicted murderer and member of a terrorist group would have those adverse consequences. Contrary to respondent's contention (Br. 79-101), Section 208(a) imposes no such requirement.

a. Section 208(a) directs the Attorney General to "establish a *procedure* for an alien physically present in the United States or at a land border or port of entry * * * to *apply* for asylum," and then provides that "the alien *may* be granted asylum *in the discretion* of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)" (emphasis added). Nothing in this language imposes *substantive* limitations on the Attorney General's discretion in passing on asylum applications. Respondent and amici rely on the fact that "refugee" is defined in 8 U.S.C. 1101(a)(42)(A) in a geographically and ideologically neutral manner. See Resp. Br. 83-84; Members of Cong. Br. 8; Amnesty Int'l Br. 53-54. But as we have explained (INS Br. 20, 23-27) and this

Court has stressed, "refugee" status simply establishes eligibility for asylum; whether to grant asylum to an alien who satisfies that requirement is expressly committed, without qualification, to "the discretion of the Attorney General." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5, 441, 444-445 (1987); *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

Furthermore, the relationship of the national interest and foreign policy concerns to the United States' treatment of refugees is expressly confirmed by the closely related provisions of Section 207, 8 U.S.C. 1157, which govern admission of refugees from outside the United States. Section 207(a)(2) directs the President to set a level of refugee admissions that he determines is "justified by humanitarian concerns or is otherwise in the *national interest*" (emphasis added), and Section 207(a)(3) provides for allocation of those admissions among refugees of "special humanitarian concern to the United States." Section 207(e) requires the President to consult with Congress about these matters and directs him to furnish it with relevant information, including an analysis of the refugee policy's impact "on the *foreign policy interests* of the United States." 8 U.S.C. 1157(e)(6) (emphasis added). Respondent concedes (Br. 87-88) that the "nationai interest" and "foreign policy interests" mentioned in Section 207 are relevant to the discretionary determination of which individual refugees outside the United States will be granted relief under Section 207(c)(1). Those important interests do not become irrelevant when it comes to deciding under Section 208(a) which refugees who have managed to enter the United States (often, as in respondent's case, illegally) should be allowed to remain.[7]

[7] Indeed, if respondent had sought admission under Section 207(c)(1) from outside the United States, the Attorney General reasonably could have found that he was not even eligible for relief: in light of respondent's criminal history and membership in a terrorist organization, the United Kingdom's strong desire that he serve his sentence for murder and related crimes, and the potential for his admission to jeopardize the United Kingdom's cooperation in anti-terrorism efforts and other matters, respondent's admission to the United States (and corresponding avoidance of punishment in the United Kingdom) would not have been indicated on "humanitarian" grounds of any sort, much less ones of "special * * * concern" to the United States. 8 U.S.C. 1157(c)(1). Surely, the Attorney General did not err in taking these same considerations into account in denying respondent relief as a discretionary matter under Section 208(a).

In contrast to respondent, amici Members of Congress contend (Br. 12) that the admission of an individual refugee under Section 207(c)(1) is governed solely by whether he is of "special humanitarian concern to the United States," and that the foreign policy and other national interests that are relevant in fashioning overall refugee policies must be excluded from consideration. Amici misread the Act. An alien must be of "special humanitarian concern to the United States" even to be eligible for admission under Section 207(c)(1). Congress therefore must have intended that *other* factors (such as the "national interest" and "foreign policy interests" mentioned elsewhere in Section 207) may play a role in discretionary determinations of which eligible refugees will be admitted. Because Section 208(a) is drafted in a parallel manner, those same factors also may play a role in discretionary asylum determinations, where the Attorney General deems them relevant.

b. Respondent (Br. 83-84) and amici Members of Con-Congress (Br. 15-26) further contend that the Attorney General's reliance on securing cooperation in combatting terrorism and related foreign policy concerns is inconsistent with the legislative history of the Refugee Act of 1980. Even if we assume, arguendo, that the legislative history could be a source of binding limitations on the exercise of discretion that is conferred by the statutory text in unqualified terms, the background of Section 208 does not suggest that reliance on those factors is impermissible.

Respondent and amici principally rely on the Refugee Act's removal of the geographical and ideological limitations on eligibility for entry from outside the United States under the prior Section 203(a)(7) of the Act, 8 U.S.C. 1153(a)(7) (1976), which was available only to aliens from Communist countries and the Middle East.

That change was accomplished by enactment of Section 207, coupled with the new definition of "refugee" in 8 U.S.C. 1101(a)(42)(A). See INS Br. 29-30. However, those amendments merely broadened the class of eligible aliens; as we have explained, which eligible aliens will actually be admitted is committed to the discretion of the Attorney General—under a framework in which respondent concedes that foreign policy interests are relevant. See page 10, *supra*. Moreover, prior to 1980, eligibility for asylum was governed by a regulation issued pursuant to the Attorney General's authority to administer the Act, 8 U.S.C. 1103, and to parole aliens into the United States, "in his discretion," "for emergent reasons or for reasons deemed strictly in the public interest," 8 U.S.C. 1182(d)(5). See 8 C.F.R. 108.1 (1980); *Cardoza-Fonseca*, 480 U.S. at 427 & n.4, 433 & n.14, 435 n.17; *Stevic*, 467 U.S. at 426 n.20. Under that regulation, any alien was eligible to apply for asylum, without the geographical and ideological limitations that then governed entry from outside the United States. The Refugee Act therefore was not necessary to remove any such limitations on eligibility for asylum. Thus, Attorney General Thornburgh's view of his discretion under Section 208(a) in no way conflicts with the legislative history upon which respondent and amici rely.

The prior asylum regulation "did not explicitly adopt a standard for the exercise of discretion," *Cardoza-Fonseca*, 480 U.S. at 433 n.14, and amici Members of Congress concede (Br. 17) that it permitted foreign policy considerations to be taken into account in deciding which aliens would be granted asylum. Section 208(a) now limits that discretion in one respect: the Attorney General may not *grant* asylum unless the alien qualifies as a "refugee" (*i.e.*, has a "well-founded fear of persecution"). But Congress left the Attorney General's discretion to *deny* asylum unfettered, just as it was under the prior regulation. Because that regulation was based in part on the Attorney General's parole authority—and because Section 212(d)(5) allows the Attorney General to take the "public interest" into account in deciding whether to grant parole—Section 208(a) cannot be read to foreclose the Attorney General from considering important aspects of the public interest in deciding whether to grant asylum.[8]

In sum, as amici Members of Congress acknowledge (Br. 7 & n.5, 22-23), and as its text shows, the principal purpose of Section 208 was to require the Attorney General to establish a "procedure" under which a refugee in the United States or at the border may "apply" for asylum (and to regulate the status of aliens granted that relief). It did not place substantive restrictions on the Attorney General's discretion in passing on asylum applications. See S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979) ("the substantive standard is not changed"); see also H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 17-18 (1979).

c. Finally, respondent (Br. 79-80, 93-94) and amici Members of Congress (Br. 17-20, 24) contend that the Attorney General's reliance on foreign policy concerns in making discretionary asylum decisions is contrary to the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Not so. As the United Nations High Commissioner for Refugees (UNHCR) has explained, "the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol." *Handbook on Procedures and Criteria for De-*

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[8] In *American Baptist Churches* v. *Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), cited by respondent (Br. 97-98) and amici (Members of Cong. Br. 9 n.9; ACLU Br. 3, 27-28; Amnesty Int'l Br. 61-62), the United States entered into a settlement agreement providing that foreign policy considerations are not relevant in determining the factual issue whether an alien has a well-founded fear of persecution. As we explained in our reply brief (at 3-4) at the petition stage, that settlement concerns only the determination of "refugee" status, and therefore *eligibility* for asylum; it does not limit the Attorney General's authority to consider foreign policy in making discretionary decisions whether to *grant* asylum.

termining Refugee Status 7 para. 25 (1988); accord G. Goodwin-Gill, *The Refugee in International Law* 104-105 (1983). Under Article 33 of the Convention, a State may not return an alien to a country where he would be threatened with persecution; the Refugee Act implemented that Article by making withholding of deportation to such a country mandatory under Section 243(h) (with specified exceptions). *Stevic*, 467 U.S. at 421. But the Convention does not adopt any standards or confer any individual rights with respect to the broader relief of asylum. Article 34 does provide that "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees." However, this provision, which the Court has described as "precatory" and "discretionary," *Cardoza-Fonseca*, 480 U.S. at 441, does not directly concern the admission of or granting of asylum to refugees, which would necessarily precede assimilation and naturalization. Thus, while Section 208(a) may "correspond" to Article 34, *Cardoza-Fonseca*, 480 U.S. at 441, it does not actually implement that Article, much less implicitly incorporate any mandatory duties, standards, or limitations from the Convention.[9]

This conclusion is consistent with the history of asylum in international law and practice. The only "right of asylum" is the right of a State to grant that relief, as an aspect of its territorial sovereignty; there is no recognized right in an individual to receive asylum.

[9] Amici Members of Congress assert that the Conference Report on the Refugee Act states that the asylum and refugee provisions were based "directly upon the language of the Protocol" and are to "be construed consistent with the Protocol." Br. 20 (quoting H.R. Conf. Rep. No. 781, *supra*, at 20). Amici are wrong. The quoted phrases express an intent that the *withholding-of-deportation* provision of the Act be construed consistent with the Protocol. As regards the broader and discretionary relief of asylum, the Report states only that "[t]he Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation." *Ibid.*

Goodwin-Gill, *supra*, at 103-104, 121-122; 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 6, 100-101, 107-109 (1966); INS Br. 25 n.11. Consistent with this view, it has long been understood that "the right of asylum 'is to be exercised by the government in the light of its own interests,'" and each sovereign State is free "to deal with refugees 'as its domestic policy or its international obligations may seem to dictate.'" Goodwin-Gill, *supra*, at 101-102 (quoting 2 *Moore's Digest of International Law* 757 (1906), and 2 *Hackworth's Digest* 622 (1941)). These principles are carried forward in Article I(3) of the U.N. Declaration on Territorial Asylum, adopted by the General Assembly in 1967, which provides that "[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum." G.A. Res. 2312 (XXII) (1967). See Goodwin-Gill, *supra*, at 105-106. There is nothing in the Refugee Act to suggest that Congress intended to depart from these principles. In particular, there is no support in that Act for the extraordinary notion that any consideration of national interest and foreign policy is impermissible.[10]

[10] Respondent and amic rely on the nonideological definition of "refugee" in Article I of the Convention. But as under Section 208(a), there is no inconsistency between that definition's standard of eligibility and the consideration of foreign policy concerns, where relevant, in rendering discretionary asylum decisions. Amici Members of Congress (Br. 17) also rely on Article 3 of the Convention, which provides that "Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin." Because the Convention does not address the granting of asylum, Article 3 has no application here. Moreover, invocation of a general policy of opposing terrorism does not constitute discrimination on the basis of the alien's country of origin. The UNHCR relies (Br. 19-24) on various precatory resolutions and recommendations that States address the refugee problem, but does not argue that the Convention itself actually prohibited the Attorney General from considering cooperation in combatting terrorism or other foreign policy interests. Finally, the fact that the granting of asylum is not an unfriendly act and therefore should not be construed by another State as a censure of its conduct or inter-

B. The Attorney General also did not abuse his discretion in denying the motion to reopen insofar as respondent sought to apply for withholding of deportation. He determined that there were "serious reasons for considering that [respondent] has committed a serious non-political crime outside the United States," and that respondent had participated in persecution of others, and therefore was excluded from eligibility under Section 243(h)(2)(A) and (C). The Attorney General relied on respondent's own admissions about the murder, possession of explosives, and other crimes he committed and his activities as an officer and active leader of the PIRA, which included distributing arms, gathering ammunition, and training and drilling other PIRA members. Pet. App. 83a-90a. Contrary to respondent's contention (Br. 52-79), nothing in the regulations or in *Abudu* (485 U.S. at 104-105) required a different disposition. INS Br. 34-37.[11] Even now, respondent does not point to any factual dispute about his own criminal conduct or involvement with the PIRA.[12] A further hearing at this

ference with its affairs (see UNHCR Br. 22; Int'l Human Rts. Group Br. 27-28) in no way suggests that a State deciding whether to grant asylum may never consider the views of other States.

[11] Amici UNHCR (Br. 10-14) and Amnesty International (Br. 27-49) discuss the provisions of the Convention and UNHCR *Handbook* that address procedures for determining refugee status and eligibility for protection. Here, however, respondent *had* a right to a hearing on asylum and withholding of deportation, but he waived those claims. He now seeks to reopen the proceedings. This Court has already held, in *Abudu*, that the Attorney General has discretion to deny such a motion without affording the alien a hearing on his underlying asylum and withholding claims. That result is both fair and consistent with the Convention. As the UNHCR acknowledges (Br. 11), under the Convention, it is "left to each Contracting State to establish the procedure that it considers most appropriate having regard to its particular constitutional and administrative structure." UNHCR *Handbook* 45 para. 189.

[12] Respondent objects (Br. 67-73, 78) to the Attorney General's reliance on government documentation and the extensive record and findings in *Matter of McMullen*, 19 I. & N. Dec. 90 (1984), aff'd,

late date would serve no purpose.[13]

Respondent's principal objection to the Attorney General's finding of serious reasons to consider that he committed a "non-political" crime is that Judge Sprizzo

788 F.2d 591 (9th Cir. 1986), regarding the PIRA's widespread acts of violence affecting both civilian and military personnel and property, Pet. App. 84a-90a, because that information was not in the record in this case. Respondent ignores the fact that this case does not involve the nature of the record that must be developed in a hearing on an application for withholding of deportation that was timely filed. The Attorney General was not required to conduct a full hearing and develop a full record before deciding even whether to reopen the proceedings. He reasonably could rely on respondent's admissions about his own conduct and on other existing sources for more legislative-type information about the PIRA's activities. That is especially so since a finding of "serious reasons for considering" under Section 243(h)(2)(C) is analogous to a finding of probable cause or reason to believe. See INS Br. 37; *Adams* v. *Baker*, 909 F.2d 643, 648-649 (1st Cir. 1990).

Moreover, respondent admitted at the extradition hearing that the PIRA engaged in extensive acts of violence that resulted in the deaths of numerous civilian and military personnel and destruction of property. See J.A. 143 ("the IRA over the past 15 years have done a very, very heavily [*sic*] bombing campaign"). Although respondent states (Br. 69) that the PIRA's policy was to give advance warning of bombings and other attacks on "economic" targets in order to avoid civilian casualties, he testified that there "has been a number of civilians killed" because of inadequate warnings or other circumstances, and that "this is the fault of the Irish Republican Army." J.A. 139-140, 142, 168. Conduct that consistently exposes civilians to such a serious risk of harm does not fall within any accepted view of protected "political" activity.

[13] Respondent (Br. 75) and amici (UNHCR Br. 18-19; Amnesty Int'l Br. 46 & n.26) contend that the seriousness of respondent's non-political crimes should be weighed against the severity of possible persecution to determine whether he qualifies for relief. The courts have rejected that balancing approach under Section 243(h), holding that an alien is excluded from eligibility if there are serious reasons for considering that he has committed a covered crime. *Ramirez-Ramos* v. *INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1487 n.10 (11th Cir. 1985). Accordingly, no hearing was required to consider the existence or substantiality of the threat of persecution respondent alleges.

found, in denying the application for extradition in 1984, that the murder and related crimes respondent committed in Belfast in 1980 fell within the exception for "political" crimes in Article V(1)(c)(i) of the 1977 Treaty of Extradition then in effect between the United States and the United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468. See Resp. Br. 59-65, 76-77. As we have explained (see pages 8-9, *supra*), however, a denial of extradition does not bar a judge from entertaining a renewed application under the same treaty. *A fortiori*, such a denial does not foreclose the Attorney General from reaching a different conclusion in the exercise of his independent authority under the Immigration and Nationality Act—especially in light of the deference owed the Attorney General's interpretation of the Act under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and under the text of Section 243(h)(2) that gives critical weight to his characterization of an offense as "non-political." See INS Br. 39-40, 44-45 n.25.

Moreover, since Judge Sprizzo ruled, the United States and United Kingdom have entered into a Supplementary Extradition Treaty under which specified crimes, including murder (one of the crimes of which respondent was convicted), are *not* to be regarded as "offense[s] of a political character." Art. 1(b), S. Exec. Rep. No. 17, 99th Cong., 2d Sess. 15 (1986). That Treaty, which expressly applies retroactively to offenses committed prior to its entering into force, *id.* at 17 (Art. 5), was proposed and ratified with the specific intent of overruling Judge Sprizzo's decision and three other decisions in which extradition of PIRA members was denied because their crimes were found to be "political" offenses under the 1977 Treaty.[14] It rests on a judgment by the political Branches that conditions in Northern Ireland do not

[14] A proposal to make the Supplementary Treaty inapplicable to offenses for which extradition was previously sought—which was specifically intended to exclude respondent from coverage—was rejected by the Senate. 132 Cong. Rec. 16,592-16,600 (1986).

warrant that result because resort to violence is unacceptable in a democratic society; that the declaration that the specified violent crimes are not to be regarded as political offenses conforms to the trend in democratic nations; and that the exclusion of violent crimes from those regarded as "political" will strengthen the credibility of this Nation's opposition to terrorism.[15] Thus, contrary to respondent's contention, the applicable extradition treaty unequivocally supports the Attorney General's finding of "serious reasons for considering" that the murder respondent concededly committed in Belfast in 1980 was a "non-political" crime that excludes him from eligibility for withholding of deportation under Section 243(h)(2)(C).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it sets aside the Attorney General's decision denying respondent's motion to reopen the deportation proceedings, and that decision should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JULY 1991

[15] See *United States and United Kingdom Supplementary Extradition Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 3, 4, 7-8, 10, 14-16, 20, 23, 24, 27-29, 36, 39, 42-44, 49-50, 260-268, 708 (1985); *Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland: Hearing before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 50-51, 52, 54, 58-59, 62-65, 67-69, 71, 77, 79-80 (1985); 132 Cong. Rec. 16,558 (1986) (Sen. Lugar); *id.* at 16,564-16,566 (reprinting opinion in *In re Requested Extradition of Doherty*); *id.* at 16,586-16,587 (Sen. Lugar); *id.* at 16,588 (Sen. Pell); *id.* at 16,594, 16,595, 16,602 (Sen. Lugar); *id.* at 16,604-16,605 (Sen. Eagleton).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JOSEPH PATRICK DOHERTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* MEMBERS OF THE UNITED STATES SENATE AND MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI

Amici curiae, 132 Members of Congress, are a bipartisan group of legislators concerned with the proper interpretation of the immigration laws.[1] *Amici* have two vital concerns in this case: (1) ensuring respect for the balance of policy-making authority between the legislative and executive branches established by the Refugee Act of 1980; and (2) guaranteeing that respondent is afforded the basic protections of asylum law, including a full and fair hearing at which he may present evidence supporting his claim.

STATEMENT

Amici curiae address this brief to the important legal question whether Congress excluded foreign policy and political considerations from the Attorney General's discretion to grant asylum to refugees under Section 208 of the Refugee Act of 1980 ("Refugee Act"). *See* Immigration and Nationality Act ("INA") § 208, 8 U.S.C. § 1158 (1988).[2] The Attorney General denied respondent a hearing on his asylum claim, in part because of foreign policy concerns. *Amici* submit that sanctioning the Attorney General's use of discretion to advance transient foreign policy goals would frustrate the clear intent of

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[1] Individual *amici* are listed beginning on the inside front cover. Both petitioner and respondent have consented to the filing of this brief *amici curiae*. The letters of consent are on file with the clerk.

[2] Section 208(a) provides that "[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." A "refugee" under INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), is defined as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."

Congress to create an ideologically neutral and humanitarian asylum program.

Respondent Joseph Patrick Doherty was arrested in 1983 by the Immigration and Naturalization Service ("INS") and subsequently imprisoned without bond. In the intervening eight years, the repeated attempts of the executive branch to return respondent to the United Kingdom—and respondent's efforts to resist return—have been the subject of extended litigation before both administrative and judicial tribunals. *See Doherty v. United States Dep't of Justice*, 908 F.2d 1108, 1110-15 (2d Cir. 1990) (detailing proceedings), *cert. granted*, 111 S. Ct. 950 (1991).

This appeal arises from the enactment during the course of the immigration proceedings of new legislation in the Republic of Ireland affecting extradition standards. As permitted by statute, *see* INA § 243(a), 8 U.S.C. § 1253(a), Doherty initially had designated the Republic of Ireland as his country of deportation. The changes in Irish law would have required Doherty's immediate extradition from Ireland to the United Kingdom. *See* Joint Appendix 99-108. As a consequence of this significant shift in substantive law, and as permitted by regulation (*see* 8 C.F.R. § 3.2 (1990)), Doherty filed a motion to reopen his deportation proceeding, seeking a hearing on his application for asylum and withholding of deportation. The Board of Immigration Appeals ("BIA") granted the motion to reopen. It held that the intervening change in legal norms violated Doherty's legitimate expectations about the country of deportation and provided a reasonable excuse for the fact that he did not apply for asylum at his deportation hearing. Petitioner's Appendix ("Pet. App.") at 140a-141a.

In an unprecedented decision,[3] the Attorney General reversed the decision of the BIA. He held, in relevant

[3] The Attorney General reviewed Doherty's case on a request for certification by the INS. *See* 8 C.F.R. § 3.1(h)(iii) (1990). In the past 20 years, the Attorney General has published less than a dozen

part, that Doherty could be denied a hearing because he was not entitled to asylum as a matter of discretion. The Attorney General relied on the following factors to support that conclusion: (i) "it is 'the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment'" (quoting *Matter of Doherty*, Mem. Att'y Gen. at 7 (June 9, 1988)); and (ii) "it is in the foreign policy interests of this country that respondent be deported to the United Kingdom."[4] Pet. App. at 82a.

The United States Court of Appeals for the Second Circuit reversed the Attorney General's decision and remanded the case for a hearing on Doherty's request for asylum. Judge Pratt, joined by Judge Feinberg, reasoned that Congress had narrowed the discretion granted to the Attorney General under Section 208 to *exclude* foreign policy considerations. *See Doherty*, 908 F.2d at 1120. The Court therefore concluded that, by relying on foreign policy implications to deny Doherty a hearing on his asylum claim, the Attorney General had abused his discretion.

In concluding that Section 208 prohibits the Attorney General from considering foreign policy or other political

decisions involving certification review. In each instance, the Attorney General limited review to legal questions and did not disturb the Board's factual findings. *See Matter of Leon-Orosco and Rodriguez-Colas*, 19 I. & N. Dec. 136 (AG 1984); *Matter of Belenzo*, 17 I. & N. Dec. 374 (AG 1981); *Matter of Cantu*, 17 I. & N. Dec. 190 (AG 1978); *Matter of Blas*, 15 I. & N. Dec. 626 (AG 1976); *Matter of Stultz*, 15 I. & N. Dec. 362 (AG 1975); *Matter of Hernandez*, 14 I. & N. Dec. 608 (AG 1974); *Matter of Toscano-Rivas*, 14 I. & N. Dec. 523 (AG 1974); *Matter of Janati-Ataie*, 14 I. & N. Dec. 216 (AG 1972). In each case that required further factfinding, the Attorney General remanded the case back to the BIA.

[4] The Attorney General also justified the denial of a hearing to Doherty on the grounds that "respondent knowingly and intentionally waived his claim to asylum," and because Doherty's past actions and associations "suggest that he is not deserving of equitable relief." Pet. App. at 82a.

factors, the Second Circuit reviewed in detail the text, legislative history, and purpose of the Refugee Act and determined that:

1. The Refugee Act replaced the pre-existing ad hoc system of parole with a systematic procedure for adjudicating asylum claims that excluded foreign policy considerations. According to the Court, Congress signalled this intent "by linking eligibility for asylum to the politically neutral definition of 'refugee.'" *Id.* at 1119.

2. The legislative history of the Refugee Act revealed the unequivocal intent of Congress to remove foreign policy considerations from the asylum process. *See id.* at 1120 (citing both House and Senate Reports). Congress intended to conform domestic law to the ideologically neutral approach of the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967) ("U.N. Protocol"). Because the purpose of the Refugee Act was to bring domestic practice into line with the politically neutral aspirations of international law, the Second Circuit, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987), reasoned that Congress would not have granted the Attorney General the discretion to frustrate that goal. Rather, the discretion delegated by Section 208 was designed only "to preserve some degree of flexibility in the administration of the asylum process . . . ." *Doherty*, 908 F.2d at 1120.

Judge Lumbard dissented. His analysis, in relevant part, relied heavily on the fact that the language of Section 208 contains no explicit textual limitations on discretion. *See id.* at 1126. Based on this premise, he concluded that Congress' removal of ideological and geographical considerations from the refugee definition had no discernable implications for the Attorney General's discretion under the Refugee Act. Judge Lumbard further relied on "a special reason for judicial restraint," that "political judgments [we]re at the heart of the [Attorney General's] decision. . . ." *Id.* at 1124. The dissent did not analyze in detail the legislative history or purpose of the Refugee Act.

SUMMARY OF ARGUMENT

The text, structure, purpose, and legislative history of the Refugee Act demonstrate that Congress excluded foreign policy and political considerations from the discretion of the Attorney General over asylum applications. To achieve that goal, Congress amended the Immigration and Nationality Act to remove ideological and geographic restrictions on refugee admissions and defined a "refugee" eligible for asylum in neutral, non-political terms. In contrast to prior legislation that extended eligibility for relief only to those fleeing communist or Middle Eastern regimes, the Refugee Act defines a refugee as any person who establishes a well-founded fear of persecution on account of political opinion or other enumerated factors. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). In fundamentally altering asylum law to create a process exclusive of ideological and political considerations, Congress prohibited the Attorney General from resurrecting politically-based criteria through the exercise of his discretion. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 434-35 (1987) (finding that Congress removed ideological, political, and geographic considerations from refugee definition); *INS v. Stevic*, 467 U.S. 407, 427 (1984) (same).

The INS errs when it argues that, because the INA expressly permits foreign policy to be considered in establishing quotas for the overseas resettlement program, the Attorney General may consider that factor in individual asylum determinations. *See* INA § 207(e)(6), 8 U.S.C. § 1157(e)(6). The conscious omission of foreign policy from the text of Section 208 and its specific inclusion in Section 207(e)(6) reflect the determination of Congress to exclude foreign policy from the individual asylum process. Furthermore, Section 207 limits the Attorney General's consideration of foreign policy to the process of setting overall numerical limits on refugee admissions, a task the statute requires to be accomplished in consultation with Congress. Foreign policy considerations are nowhere made relevant to the in-

dividual admissions determinations under Section 207(b) that are more closely analogous to Section 208 decisions.

An examination of the purpose and legislative history of the Refugee Act reinforces the conclusion that the statute prohibits the executive from weighing foreign policy concerns in deciding asylum claims. In modifying existing law, Congress designed the Refugee Act to serve three important purposes relevant here. First, Congress explicitly conformed United States law to the nonideological approach of the United Nations Protocol, an approach steeped in humanitarian, not political, concerns. Second, Congress directed that applicants be treated fairly and uniformly and on the basis of the merits of each individual claim. Third, Congress reasserted its control over refugee policy by narrowing in several ways the authority of the Attorney General. Each of these motivations, all evident on the legislative record, is inconsistent with petitioner's claim of unfettered authority over asylum determinations; indeed, the consideration of foreign policy factors by the Attorney General would eviscerate the clear intent of Congress.

Finally, the INS asserts that the decision to deny a hearing on Doherty's asylum claim is entitled to deference under both general administrative law principles and the plenary power doctrine. Neither shields the Attorney General's decision from judicial review. The novel statutory interpretation advanced by the INS—a position never accepted by any court—is wholly inconsistent with the text and history of the Refugee Act and, therefore, is not entitled to deference. The INS' reliance on its historical prerogatives over immigration clashes with Congress' decision to eliminate foreign policy factors from individual asylum determinations.

ARGUMENT

Section 208 of the Refugee Act delegates "discretion" to the Attorney General to grant asylum to refugees. This grant of discretion, by itself, does not confer unbridled authority. Limits on such discretion are properly derived from the text, structure, and legislative history of the statute. In this case, Congress specifically amended the immigration laws to create a politically-neutral asylum regime that conforms to the nonideological aspirations of international law; Congress could not have intended, at the same time, to cede back to the Attorney General the uncontrolled discretion to frustrate the fundamental purpose of the Refugee Act.

I. THE TEXT AND STRUCTURE OF THE REFUGEE ACT REFLECT CONGRESSIONAL INTENT TO EXCLUDE FOREIGN POLICY AND POLITICAL CONSIDERATIONS FROM THE ATTORNEY GENERAL'S DISCRETION UNDER SECTION 208

The text and structure of the Refugee Act make clear that foreign policy and political considerations may not properly influence the Attorney General's asylum determinations. The Refugee Act enunciated several fundamental principles that govern its implementation and interpretation.

First, Section 208(a) specifically provides for individualized decisionmaking;[5] the Refugee Act mandates the adjudication of asylum claims on the basis of an administrative record and individual merit. The emphasis on individualized assessment reflects the personal —and humanitarian—roots of the Refugee Act and suggests that reliance on broad policy goals separate and apart from the applicant's claim of persecution (and

[5] "The Attorney General *shall* establish a procedure for an alien physically present in the United States . . . to apply for asylum . . . ." INA § 208(a), 8 U.S.C. § 1158(a) (emphasis added).

beyond the capability of the refugee to assess and rebut) is inconsistent with the Refugee Act.[6]

Second, and most important, the Refugee Act marked a fundamental shift from prior refugee regimes that limited eligibility for relief to those fleeing communist or Middle Eastern countries.[7] Eligibility for asylum under the Act is determined under an ideologically neutral and apolitical standard: a refugee is defined as a person who is outside his country and unable to return "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). The shift from a politically-driven refugee regime to a system defined by ideological neutrality constituted the most significant policy innovation of the Refugee Act and signalled a reorientation of refugee law towards humani-

[6] The INS relies heavily upon *Jay v. Boyd*, a 5-4 decision in which the Court permitted the INS to deny suspension of deportation based on "confidential information" not disclosed to the alien. 351 U.S. 345, 349-50 & n.6 (1956). The Court characterized the discretion to suspend deportation under Section 244(a) of the INA as "unfettered." *Id.* at 354. It based this description on the fact that Congress did "not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised." *Id.* In *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966), Judge Friendly discussed the precise language relied on by the INS and emphasized that it did not preclude the federal courts from ensuring that, when exercising discretion, the agency acted consistently with congressional intent. As described in this brief, the Refugee Act supplies a quite different statutory backdrop than that surrounding the INA's suspension provision and one that mandates a different conclusion on the scope of discretion.

[7] INA § 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed 1980), permitted "conditional entry status" and provided for admission and permanent residence for certain persons fleeing persecution from communist or Middle Eastern countries, as well as persons fleeing a "natural calamity" declared by the President. *See Stevic*, 467 U.S. at 415. The Refugee Act removed this provision from the INA. Refugee Act § 203(b).

tarian principles and away from partisan political influences.[8]

Petitioner contends, however, that the politically-neutral definition of refugee applies only to eligibility for asylum but does not limit in any respect the discretion to deny asylum to an otherwise eligible person. *See* Pet. Br. at 25.[9] Such a contention is wholly inconsistent with the structural limitations at the foundation of the Refugee Act.[10] Carried to its logical conclusion, the rule offered by petitioner would empower the Attorney General unilaterally to deport entire classes of refugees on the ground that the recognition of persecution might adversely affect the relations of the United States with a friendly nation.[11] The Attorney General could, under this theory

[8] *See* Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1262 n.39 (1990) ("Congress intended the refugee standards to be applied neutrally and without ideological bias") (citations omitted).

[9] The Attorney General, along with the INS and the Department of State, has admitted that "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is *not* relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (emphasis added) (settling class action challenging INS treatment of Salvadoran and Guatemalan asylum-seekers and allowing any who had been denied relief to have claim reconsidered). Despite that admission, the INS now attempts to reintroduce foreign policy considerations in through the back door.

[10] Indeed, the regulations promulgated by the Attorney General list several factors that may be weighed in exercising a discretionary asylum decision; foreign policy is not among them. *See* 8 C.F.R. § 208.14(c) (1990). Nor has the BIA ever ruled that foreign policy is a relevant factor. *See* note 43 *infra*.

[11] Many commentators have observed that even after the passage of the Refugee Act the Attorney General and his delegates continue to enforce a *sub silentio* pattern of political discrimination in refugee decisions. *See, e.g.*, N. Zucker & N. Zucker, *The Guarded Gate: The Reality of American Refugee Policy* 140-76 (1987); Johnson, *A "Hard Look" at the Executive Branch's Asylum Deci-*

of unbridled discretion, deny the asylum claims of all Salvadorans while granting the claims of all Iraqis, depending upon the current foreign policy agenda. The interpretation advanced by the INS requires the anomalous conclusion that Congress fundamentally restructured the immigration laws to broaden the pool of eligible applicants to all refugees regardless of country of origin and at the same time granted the Attorney General the authority to pursue the exact same foreign-policy oriented practices in effect before amendment. Such a warped interpretation of the Refugee Act would undermine the ideologically and geographically neutral definition of refugee, vitiate the congressional mandate to decide asylum claims on an individual basis, and effectively

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sions, 1991 Utah L. Rev. —— (forthcoming June 1991); Schuck, *The Emerging Political Consensus on Immigration Law*, 5 Geo. Immigr. L.J. 1, 7 (1991); Kurzban, *A Critical Analysis of Refugee Law*, 36 U. Miami L. Rev. 865 (1982); Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986). The General Accounting Office reported in 1987 that persons who flee communist or otherwise unfriendly countries are still granted asylum with much greater frequency than those from authoritarian regimes allied with the United States. *See* United States General Accounting Office, *Asylum: Uniform Application of Standards Uncertain—Few Applicants Deported* 22, 42 (1987); *see also* Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 255 (1990) (concluding that "ideological . . . and . . . political judgements continue to influence the decision-making process"); *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 219-20 (2d Cir. 1991) (reversing denial of asylum and suggesting that unstated foreign policy considerations tainted asylum decision on Salvadoran refugee).

Congress, in enacting the Refugee Act, was acutely aware of the hardships imposed by the existing geographical and ideological limits. For instance, refugees fleeing the despotic Duvalier regime in Haiti were ineligible for relief under the INA. *See* 125 Cong. Rec. H11973-78 (Dec. 13, 1979) (remarks of Rep. Chisholm). The position of the INS, carried to its logical conclusion, would vest the Attorney General with the untrammeled authority to abandon these refugees in the name of political expediency.

read out of the Act all of the carefully crafted provisions that limit executive discretion. At bottom, the denial of even a hearing on Doherty's asylum claim—a decision that ultimately rests on transient foreign policy goals declared by the executive branch—is at odds with the structure and promise of the Refugee Act. Nothing in the text of Section 208 permits, much less compels, such an outcome.

The INS also argues that because Congress referred to foreign policy in Section 207(e)(6), 8 U.S.C. § 1157(e)(6), it necessarily follows that the executive may properly consider foreign policy in the exercise of discretion under Section 208. *See* Pet. Br. at 25-27. This argument is incorrect. Section 207 requires the President, when consulting with Congress on the quota and allocation provisions of the overseas admissions program, to provide information on how admissions will affect "the foreign policy interests of the United States." INA § 207(e)(6), 8 U.S.C. § 1157(e)(6); *see Cardoza-Fonseca*, 480 U.S. at 433 (distinguishing Sections 207 and 208). Congress, in the very next section of the same statute, which governs "the process by which refugees currently in the United States may be granted asylum," 480 U.S. at 433, did not include foreign policy as a factor properly considered in the disposition of individual asylum claims. The inclusion of foreign policy considerations in Section 207 and its conscious omission from Section 208 reflect the significant differences between the setting of broad quotas in direct consultation with Congress and the notions of personal fairness implicated in the adjudication of individual claims.[12] "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

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[12] *See* Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, 40 (1987) ("[Section 207] serves the larger requirements of U.S. policy; [Section 208] responds to the immediate needs of individuals").

purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see Cardoza-Fonseca*, 480 U.S. at 432 (quoting *Russello*).

Moreover, the INS misreads Section 207. Section 207 provides that, in making complex determinations regarding the establishment of numerical limits for the annual admission of refugees, the executive may consider a number of different factors, including those related to the "national interest." *See* INA § 207(a)(1), 8 U.S.C. § 1157(a)(1). In contrast, decisions to admit individual refugees within this allocative framework are governed solely by the statutory definition of refugee in Section 101(a)(42) and by whether the refugee is of "special humanitarian concern to the United States. . . ." INA § 207(c)(1), 8 U.S.C. § 1157(c)(1). By providing humanitarian (rather than national interest) concerns as the guiding principle for individual refugee admissions under Section 207, Congress effectively excluded broad political considerations from *individual* refugee determinations.[13] These individual determinations—and not the setting of numerical limits—are most closely analogous to asylum determinations under Section 208.[14]

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[13] Thus, the INS misreads Section 207(c) when it baldly states that Doherty, if he were overseas, could have been denied admission solely on the basis of political undesirability. Pet. Br. at 21.

[14] In a similar manner, petitioner repeatedly suggests that, because the Second Circuit affirmed Attorney General Meese's foreign-policy based decision not to deport Doherty to Ireland under Section 243(a), its conclusion that foreign policy is an impermissible consideration under Section 208 is untenable. *See* Pet. Br. at 22. That argument ignores the significant textual differences between Sections 243(a) and 208. Section 243(a), 8 U.S.C. § 1253(a), expressly provides that an alien shall be deported to the country that he or she designates "unless the Attorney General, in his discretion, concludes that deportation to such country *would be prejudicial to the interests of the United States.*" (Emphasis added.) -Section 208, however, includes no comparable provision.

At bottom, the INS is left to argue that the absence of any specific textual limitation means that the Attorney General's discretion is unfettered and unreviewable by the judiciary. But its argument misconceives the nature of the inquiry; this Court has always looked to the structure and text of the entire statute for guidance as to the meaning of a particular provision. *See, e.g., United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").[15] In this case, the Refugee Act, considered as a whole, effectively prohibits the Attorney General from weighing foreign policy and political considerations in asylum decisions because they are "'considerations that Congress could not have intended to make relevant.'" *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) (quoting *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.)); *see Cardoza-Fonseca*, 480 U.S at 449 (acknowledging "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien") (citations omitted).[16]

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[15] *See also International Primate Protection League v. Administrators of Tulane Educ. Fund*, 59 U.S.L.W. 4424, 4426 (U.S. May 20, 1991) ("'We continue to recognize that context is important in the quest for [a] word's meaning,' . . . and that '[s]tatutory construction . . . is a holistic endeavor'") (citation omitted); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law") (citation omitted).

[16] *See also Jean v. Nelson*, 472 U.S. 846, 855-57 (1985) (holding that the discretion to parole aliens into the country excludes discrimination on the basis of race or national origin); L. Jaffe, *Judicial Control of Administrative Action* 181-82 (1965) (reviewing court must ensure that only "relevant factors" are considered by agency and that "legally irrelevant or forbidden considerations have

Finally, the INS protests that the rule articulated by the Second Circuit would strip the Attorney General of virtually all discretion, and it characterizes the choice for this Court as between a hamstrung Attorney General and a system of "unfettered" discretion.[17] Pet. Br. at 23, 33. But the INS poses a false dichotomy. In granting discretionary authority to the executive branch, Congress faced a spectrum of choice between mandatory relief and unreviewable discretion.[18] In the asylum context, Congress delegated substantial authority to the Attorney General, imposing only the reasonable—and perfectly foreseeable—requirement that he exercise this discretion in a manner

[not] determined the decision"); *cf.* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 757 (1982) (appellate court reviewing trial court exercise of discretion should strive "to eliminate or curtail decisions based on impermissible factors") (footnote omitted).

[17] *Amici* do not, and need not, attempt to delineate the various factors the Attorney General may properly weigh in exercising his discretion to grant or deny the asylum claim of a *bona fide* refugee. Many factors consistent with the purposes of the Refugee Act might well be appropriate for consideration. However, the only factor presented here—the role of foreign policy—cannot be properly considered consistent with the statute.

[18] The INS argues that the decision of the Second Circuit is inconsistent with this Court's opinions that have described Section 208 as a discretionary remedy. Pet. Br. at 23-26 (citing *Cardoza-Fonseca*, 480 U.S. at 441, and *Stevic*, 467 U.S. at 423). There is no dispute on this issue; Congress did grant discretion to the Attorney General to decide asylum claims. The only question here, a question left open by *Cardoza-Fonseca* and *Stevic*, concerns the scope of that discretion.

The INS also urges that the holding of the Second Circuit is inconsistent with *Cardoza-Fonseca* because it makes asylum a more readily-available remedy than withholding of deportation. This theory turns on the unstated and misguided assumption that the exclusion of foreign policy and political considerations from Section 208 eliminates all discretion. Congress, however, granted significant discretion to the Attorney General, but instructed him to exercise that discretion in a fashion consistent with the purposes of the Refugee Act. The Attorney General failed to do so in this case.

consistent with the structure and goals of the Refugee Act.[19]

II. THE LEGISLATIVE HISTORY OF THE REFUGEE ACT DEMONSTRATES THAT CONGRESS INTENDED FOR ASYLUM CLAIMS TO BE ADJUDICATED ON A NONPOLITICAL BASIS.

In addition to the text and structure of the Refugee Act, its legislative history offers strong support for the conclusion that the Attorney General may not consider foreign policy in making asylum decisions. *See Cardoza-Fonseca*, 480 U.S. at 432-43 (interpreting Refugee Act in light of its legislative history); *Stevic*, 467 U.S. at 421-29 (same). When Congress enacted the Refugee Act, it sought to end the era of ad hoc and politicized asylum policy and to create a neutral and nonideological regime.[20] The legislative history reflects this intent.

Before World War II, Congress had never passed legislation providing for the admission or protection of persons fleeing persecution.[21] In the wake of the uprooting of a significant portion of Europe's population and the United States' emergence as a world leader, Congress began to provide for admission of refugees into this country.[22] These measures were reactive, ad hoc, and largely insufficient to deal with the emerging global refugee crisis.[23]

[19] This interpretation is consistent with the analysis of the commentators who have considered the specific question. *See* Anker, 28 Va. J. Int'l L. at 55-56; Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999, 1009-11 (1985).

[20] *See generally* G. Loescher & J. Scanlon, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (1986).

[21] *See* T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 50-53 (1985).

[22] *See* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 12-20 (1981).

[23] *See id.* at 17-19.

In response to the invasion of Hungary by the Soviet Union in 1956, the Attorney General began to rely on his "parole" authority under the Immigration and Nationality Act to admit large numbers of refugees into the country.[24] The parole power evolved into the primary mechanism for admission of refugees. It was exercised beyond the checks of either the judicial or legislative branches and in a manner consistent with Cold War politics—those who fled communist countries were generally paroled into the country while those who fled noncommunist countries rarely received comparable relief.[25] Congress, at least in some respects, also conceived of the refugee laws in ideological terms; in 1965, it enacted the conditional entry provisions of the INA that expressly limited relief to persons fleeing a communist or Middle Eastern country.[26]

Apart from these programs for the admission of refugees, the Attorney General also possessed the discretion to withhold the deportation of an alien to any country where he would be subject to persecution.[27] Before 1980, withholding of deportation under Section 243(h) was committed to the absolute discretion of the Attorney General, and he exercised this discretion only in the rarest of instances.[28]

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[24] INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1952). The parole authority vested the Attorney General with the discretion to permit the entry of persons "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest . . . ." INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). The Refugee Act specifically limited the parole power to cases involving "compelling reasons." *See* INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B); *see also infra* at 24-25.

[25] *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 246 (1984).

[26] *See* INA § 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed 1980).

[27] INA § 243(h), 8 U.S.C. § 1253(h) (1970) (amended 1980).

[28] *See* Anker, 28 Va. J. Int'l L. at 32 & n.160; Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U.L.Q. 59, 100 (1976).

In the late 1960s, a new development placed the executive's domination of refugee policy in question. In 1967, the United States formally acceded to the United Nations Protocol Relating to the Status of Refugees.[29] The U.N. Protocol defines a refugee in strictly nonideological terms and obligates signatory states to implement their respective refugee policies without regard to the politics of the applicant or his homeland.[30] Article 3 of the Protocol requires that each "Contracting State[] . . . apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin*" (emphasis added).

Despite accession to the U.N. Protocol and its commitment to a refugee system divorced from ideological concerns, the executive branch persisted in its politically-motivated refugee practice. *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 249-50 (1984). Regulations promulgated as late as 1974 afforded the INS complete discretion over refugee admissions and failed to articulate any standards for eligibility determinations. *See* 8 C.F.R. §§ 108.1, 108.2 (1976); *Stevic*, 467 U.S. at 420 n.13. The regulations thus permitted the executive branch to continue its practice of adjudicating claims for relief at least partially on the basis of prevailing foreign policy considerations.[31]

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[29] By ratifying the U.N. Protocol, the United States bound itself to Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[30] Article 33 of the U.N. Protocol further provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[31] *See* Note, 1 Geo. Immigr. L.J. at 500-11; Hansen, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107, 123-25 (1978).

Throughout the 1970s, Congress expressed concern that the Attorney General was making discretionary refugee decisions in a manner inconsistent with the nonideological and humanitarian goals of the U.N. Protocol. *See Doherty*, 908 F.2d at 1118-19; Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 20-30 (1981). Various legislative proposals were advanced to remedy the perceived defects in the law and to end the era of ad hoc, discretionary, and discriminatory decisionmaking. Anker & Posner, 19 San Diego L. Rev. at 20-30. None of these efforts bore fruit until 1980.

The Refugee Act of 1980 "radically revised U.S. refugee and asylum law and procedures" [32] and restored congressional leadership to the field. The Act affirmed "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), and articulated a "national policy of welcome to refugees." S. Rep. No. 256, 96th Cong., 1st Sess. 3 (1979). Rejecting previous refugee provisions as "outdated, unrealistic, and discriminatory," [33] the Refugee Act remodeled the Immigration and Nationality Act in several fundamental respects. The Refugee Act (1) rejected the politicization of refugee determinations as a "cold war relic" [34] and explicitly adopted the nonideological and humanitarian approach of the U.N. Protocol, (2) required the Attorney General to establish procedures to ensure that each asylum-seeker's claim would be adjudicated on its individual merits, and (3) circumscribed the discretion of the Attorney General over refugee and asylum decisions. Petitioner's contention that Congress intended to confer unfettered discretion is inconsistent with each of these principles.

[32] *Refugee Assistance: Hearings on H.R. 3915 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 56 (1983) (statement of Elliott Abrams, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State).

[33] *Refugee Act of 1979: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979) (statement of Rep. Holtzman, co-sponsor of the Refugee Act of 1979, H.R. 2816).

[34] *Id.*

First, the overriding purpose of the Refugee Act was to bring the United States into conformance with international legal principles of fairness and neutrality in the implementation of refugee and asylum policy. *See Cardoza-Fonseca*, 480 U.S. at 436 ("[i]f one thing is clear from . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol") (citations omitted).[35] The U.N. Protocol defines refugee in strictly nonpolitical terms.[36] Recognition of refugee status under international law rests exclusively upon individual circumstances and not the foreign policies of signatory nations. The Convention, and the 1967 Protocol, explicitly accept the principle of nondiscrimination based on country of origin.[37] *See supra*

[35] *See also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 551-52 (9th Cir. 1990); *Doherty*, 908 F.2d at 1119; *Yiu Sing Chun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983); *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd sub nom. INS v. Stevic*, 467 U.S. 407 (1984).

[36] *See* note 30 and accompanying text *supra*. "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. . . . He does not become a refugee because of recognition, but is recognized because he is a refugee." Office of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugees Status* ¶ 28 (1979). The UNHCR Handbook provides significant guidance to the meaning of the Protocol and, by implication, to the Refugee Act. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

[37] *See* Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333, 346-47 (1984). The *travaux preparatoires* (history of negotiations) reveal that the United States, in the early rounds of negotiations, advocated limiting the protections of the

at 17 (quoting U.N. Protocol). The principle of nondiscrimination was considered such a central part of the Convention that, unlike other provisions, signatories could not make a reservation to Article 3. *See* U.N. Protocol, Article 42. The concept of an ideologically neutral refugee policy thus stands at the core of international law.

The Conference Reports to the Refugee Act declared that the Committee drafted the asylum and refugee provisions with the "understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980). Congress adopted the U.N. Protocol's definition of refugee and simultaneously eliminated existing provisions, including the geographical limitations and the open-ended parole authority, which were inconsistent with international norms. Numerous witnesses, and many Members of Congress, expressed the view that these changes in refugee and asylum law would end the intrusion of politics into refugee policy and make American law consistent with the humanitarian impulse of international rules.[38] This respect for the nondiscriminatory

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Convention to persons of particular nationalities. This position was rejected, and the United States ultimately acceded to the nondiscrimination viewpoint. *Id.*; *see also Restatement (Second) Foreign Relations Law of the United States* § 147 (1965) (concluding that the history of negotiations may be taken into account in interpreting international agreements).

[38] *See, e.g.*, 125 Cong. Rec. H11,973 (Dec. 13, 1979) (remarks of Rep. Chisholm) ("[r]efugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States"); 125 Cong. Rec. 23,240 (1979) (remarks of Sen. Boschwitz) ("[i]f our commitment to help desperate, homeless people is sincere, we must be willing to help all in need of assistance despite their ideologies or *countries or* [sic] *origin*") (emphasis added); 126 Cong. Rec. 4,501 (1980) (remarks of Rep. Rodino) ("one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress"); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979)

purposes of the Refugee Act was equally reflected in the President's signing statement. *See* President Jimmy Carter's Signing Statement, 16 Weekly Comp. Pres. Doc. 503 (March 18, 1980) (the Refugee Act "establishes a new admissions policy that will permit fair and equitable treatment of refugees in the United States, regardless of their country of origin"). Contrary to the mechanistic interpretation of the INS, this rule of nondiscrimination forms the bedrock principle of the Refugee Act, and this basic concept informs the interpretation of all of its provisions.

Petitioner leans heavily upon the statement in the Senate report that "the substantive standard [for relief] is not changed," Pet. Br. at 29, and notes that the Court quoted this exact language in *Cardoza-Fonseca*, 480 U.S. at 435 n.16. But a close examination of the context of this statement does not support the INS' interpretation. The statement in the Senate Report, read

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(stating that definition of refugee "eliminates the geographical and ideological restrictions" in current law); 126 Cong. Rec. 4,499 (1980) (remarks of Rep. Holtzman) (the new definition of refugee "finally eliminates the geographical and ideological restrictions applicable to refugees"); 126 Cong. Rec. 4,507 (1980) (remarks of Rep. Chisholm) (refugee admissions would no longer be "tainted with ideological, geographical or racial or ethnic biases"); *see also Briefings on the Growing Refugee Problem—Implications for the International Organizations: Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 21 (1979) (remarks of Dick Clark, United States Coordinator for Refugee Affairs and Ambassador-at-Large) (stating that the Refugee Act "would make all people—regardless of their ideology, regardless of their geography—eligible for" relief).

The comments of Senator DeConcini to Secretary of State Vance illustrate the frustration of Congress with the executive branch's practice of infusing foreign policy into refugee matters: "If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are a boat refugee from Baby Doc's Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes." *United States Refugee Problems: Hearings before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 14 (1980).

in context, refers only to the conditions for eligibility for asylum and not to the exercise of discretion in individual asylum cases. *See* S. Rep. No. 256, *supra*, at 9. Indeed, this Court cited the Senate Report statement to support the proposition that "Congress was told that the extant asylum procedure for refugees outside of the United States was acceptable under the Protocol, *except for the fact that it made various unacceptable geographic and political distinctions.*" *Cardoza-Fonseca*, 480 U.S. at 434-35 (emphasis added).[39] The principal substantive innovation of the Refugee Act affected the asylum eligibility criteria and, by necessary implication, the discretion of the Attorney General; the primary support for the INS' revisionist legislative history is thus inapplicable.[40]

Second, Congress directed the Attorney General to create "a new uniform asylum procedure" to govern administrative decisionmaking. S. Conf. Rep. No. 590, *supra*, at 20; H.R. Conf. Rep. No. 781, *supra*, at 20; *see* INA § 208, 8 U.S.C. § 1158; *Yiu Sing Shun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983) (quoting House Conference Report). In establishing uniform procedures, Congress directed that all asylum-seekers be treated evenhandedly, and that similarly-situated applicants be held to the same standard.[41] The legislative history reflects the con-

[39] *See also Stevic*, 467 U.S. at 427; Schuck, 5 Geo. Immigr. L. J. at 7; Martin, 138 U. Pa. L. Rev. at 1261-62; Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. Mich. J. L. Ref. 183, 235 (1984).

[40] The INS also chides the Second Circuit for relying on statements in the legislative record relating to Section 207 of the Refugee Act in interpreting the scope of discretion under Section 208. Pet. Br. at 29-30. Curiously, on the very next page of its brief, the INS cites several legislative comments, all of which relate to Section 207(a). Pet. Br. at 31 nn.16 & 17.

[41] *See* Letter from Senator Kennedy to Secretary of State Vance (reprinted in S. Rep. No. 256, *supra*, at 2) (the United States must "establish a long range refugee policy—a policy which will treat all refugees fairly and assist all refugees equally").

sensus that asylum applicants should be judged fairly and in accordance with the humanitarian goals of the Refugee Act. *See, e.g.*, H.R. Rep. No. 608, *supra*, at 17-18. By requiring uniform procedures, Congress effectively instructed the Attorney General to evaluate each application for asylum on the merits of the individual claim of persecution and not by reference to foreign policy or political goals.

The decision of Congress to require adjudication of asylum claims on their individual merits reflects its recognition of the humanitarian and protective nature of asylum.[42] As this Court has emphasized, "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca*, 480 U.S. at 449; *see also Reyes-Arias v. INS*, 866 F.2d 500, 504 (D.C. Cir. 1989) (Starr, J.) (describing asylum as the "most sensitive of human claims in the international community"). Consistent with this understanding of asylum, Congress created a system of adjudication based upon the merits of an individual's case, not upon the relations between the United States and the country of origin.[43] The practice of denying asylum claims on

[42] The Refugee Act "gives statutory meaning to our national commitment to human rights and humanitarian concerns . . . ." S. Rep. No. 256, *supra*, at 1. The INS, in its own brief, acknowledges the humanitarian foundations of the Act, describing Doherty as seeking "the special humanitarian relief of asylum." Pet. Br. at 19, 33.

[43] Indeed, until the Attorney General intervened in this case, the executive had adhered to this interpretation of the Refugee Act. In *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (BIA 1987), the BIA emphasized that the agency must weigh "the totality of the circumstances" and that, once an asylum applicant establishes a well-founded fear of persecution, "the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors." Until this case,

grounds unrelated to their merits because of prevailing political or foreign policy goals is anathema to the humanitarian purpose behind the Refugee Act.

Third, the Refugee Act overhauled the respective roles of the executive and the legislative branches in refugee and asylum decisions. Besides adopting the rules of the U.N. Protocol and affording procedural protections to asylum-seekers, Congress made clear in several ways that the unrestricted executive control over refugee law that had evolved over several decades would be significantly curtailed. In particular, Congress mandated regular consultation between the executive and Congress, thereby routinizing congressional input into refugee policy.[44] *See* INA § 207, 8 U.S.C. § 1157; 125 Cong. Rec.

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discretionary denials have been limited to matters of administrative efficiency and fairness. *See Doherty*, 908 F.2d at 1120. These applicants typically abused the asylum process or had found safe haven in other countries. *Id.* at 1120-21; *see also* Anker, 28 Va. J. Int'l L. at 49-51 (arguing that alternative safe haven and danger to the community are relevant discretionary factors); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999 (1985). Since *Pula*, the BIA has denied few asylum claims on discretionary grounds. *See* Anker & Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 Int'l J. Refugee L. 67, 70 (1989); *see also* Martin, 138 U. Pa. L. Rev. at 1265-66 (praising executive's limited denial of asylum on discretionary grounds).

[44] The Refugee Act requires annual consultation between the President and Congress on the refugee admission quotas. INA § 207(e), 8 U.S.C. § 1157(e). The President must submit a detailed report to Congress on the status of refugees throughout the world and a proposal for the admission of refugees into the United States. *See* INA § 207(d)(1), 8 U.S.C. § 1157(d)(1). After congressional hearings on the President's proposal, a joint plan for the admission of refugees from the various regions of the world is adopted. *See* INA §§ 207(a)(3), 207(d)(3), 8 U.S.C. §§ 1157(a)(3), 1157(d)(3)(A); *see also* Blum & Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy*, 16 N.Y.U. Rev. L. Soc. Change 55, 66 n.69 (1987-88). The President also must undertake appropriate consultation with Congress on any emergency refugee initiatives. *See* INA § 207(b), 8 U.S.C. § 1157(b).

S12,007 (Sept. 6, 1979) (statement of Sen. Robert Byrd) (Refugee Act "provides for the first time the statutory requirement that Congress be consulted before refugees are admitted, and defines and exerts congressional control over the process").

In addition, the Refugee Act transformed withholding of deportation from a completely discretionary to a mandatory form of relief in any instance in which the applicant establishes a clear probability of persecution. *See* INA § 243(h), 8 U.S.C. § 1253(h); *INS v. Stevic*, 467 U.S. 407, 421-25 (1984). This change brought the Refugee Act into conformity with international law[45] and further constricted the discretionary authority of the Attorney General.

Moreover, Congress virtually eliminated the broad power of the Attorney General to parole refugees into the country. The Refugee Act specifically limited the use of the parole authority to situations in which the Attorney General "determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee" under Section 207. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). Thus, Congress further narrowed the discretion of the Attorney General and funnelled individual refugee determinations into a formal and uniform process.

Finally, the Refugee Act vested the Attorney General with discretion over asylum decisions but did so in a manner markedly different from the "sweeping delega-

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[45] *See* H.R. Rep. No. 608, *supra*, at 18 ("[a]s with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements"); *see also* Anker & Posner, 19 San Diego L. Rev. at 45 (observing that amendment of § 243(h) represented a movement "towards consonance with the UN Convention").

tions"[46] found in other provisions of the INA. Congress gave the Attorney General authority to create a "*fair and workable* asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law. . . ." H.R. Rep. No. 608, *supra*, at 17-18 (emphasis added).[47] Congress, acknowledging the difficulties of creating a "workable" policy, vested the Attorney General with discretion, but it required him to exercise his authority in harmony with the ideologically neutral and humanitarian impulses of the Refugee Act. The legislative determination to channel the Attorney General's authority further rebuts the INS' notion of unfettered discretion. *See* Anker & Posner, 19 San Diego L. Rev. at 36 (Refugee Act "structure[s] and control[s] executive decision making").

In light of the many steps taken by Congress to limit executive authority over refugee law, it is clear that the Attorney General's reliance on the "unfettered discretion" of Section 208 to deny Doherty a hearing for foreign policy reasons is inconsistent with fundamental tenets of the Refugee Act.

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[46] *See Jean v. Nelson*, 727 F.2d 957, 965-67 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

[47] *See, e.g., Admission of Refugees into the United States: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 97 (1977) (statement of Rep. Eilberg) ("I am the first to recognize that we must preserve some degree of administrative flexibility in admitting refugees to this country, but at the same time Congress cannot shirk its responsibility to legislate orderly, consistent, and uniform procedures governing their admission"); Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1 (1987); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999 (1985); Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 San Diego L. Rev. 144, 145-48 (1975).

III. BECAUSE THE POSITION ASSERTED BY THE INS IS CONTRARY TO THE REFUGEE ACT, IT IS NOT ENTITLED TO DEFERENCE.

In its final attacks on the decision of the Second Circuit, the INS offers several reasons why this Court should defer to its reading of the Refugee Act. Its concerns are inapplicable here.

First, the INS suggests, as a general principle of administrative law, that the legal interpretations of the Attorney General are entitled to deference as a matter of course. Pet. Br. at 40. However, this Court consistently has required agencies to act in harmony with the mandate of Congress.[48] Deference to the interpretations of the Attorney General is particularly unwarranted here because the text and history of the Refugee Act evidence the unambiguous intent of Congress. In *Cardoza-Fonseca*, this Court rejected the executive's interpretation of the statute because it was contrary to clear congressional intent as determined by "traditional tools of statutory construction." 480 U.S. at 446. The Court emphasized that the judiciary remains the " 'final authority' " on statutory interpretation. *Id.* at 447 (citation omitted).[49] In this case, the petitioner's novel theory

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[48] *See Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (emphasizing that courts should reverse " 'administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute' ") (citation omitted); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasizing that "agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider") (citation omitted).

[49] This Court has been reluctant to extend untoward deference to the INS in the immigration context. *See Cardoza-Fonseca*, 480 U.S. at 452 (Blackmun, J., concurring) ("[t]he efforts of [the lower courts in interpreting the statute] stand in stark contrast to—but, it is sad to say, alone cannot make up for—the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care").

is contrary to clear congressional intent and not entitled to deference.[50]

Second, petitioner argues, relying on *INS v. Abudu*, 485 U.S. 94 (1988), that the plenary power doctrine insulates its decisions from judicial review. Pet. Br. at 33-34. However, this Court traditionally has applied that doctrine to shield laws enacted by *Congress* in the immigration area from judicial scrutiny.[51] Indeed, Congress explicitly recognized in enacting the Refugee Act that it—not the executive—was exercising its plenary power over immigration. *See* 125 Cong. Rec. H11,967 (Dec. 13, 1979) (statement of Rep. Lott) ("[t]he committee was extremely concerned about assuring that Congress has a proper and substantial role in refugee admissions, given *our plenary power over immigration*") (emphasis added).

When the judiciary has deferred to the executive plenary power, it has done so only when Congress has not imposed statutory limitations on the executive branch. *See Abudu*, 485 U.S. at 110 (stating that "abuse-of-discretion standard will often apply to agency adjudications *not governed by specific statutory commands*") (em-

[50] The clear congressional intent distinguishes this case from the cases cited by petitioner in support of its deference theory. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990) (holding that traditional tools of statutory construction failed to evince clear congressional intent and therefore court should defer to agency interpretation); *see also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.) (stating that when Congress establishes rule binding agency, agency interpretation "is entitled to . . . little force") (citations omitted).

[51] For instance, the seminal plenary power case involved judicial review of the Chinese Exclusion Act. *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Virtually all of the cases cited by petitioner in its brief involve review of the decisions of Congress, not the executive, on immigration matters. *See Fiallo v. Bell*, 430 U.S. 787 (1977); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

phasis added). Here, the Attorney General operates pursuant to a statute whose principal animating purpose was to reassert congressional control over standardless and wholly discretionary decisionmaking by the executive. *See supra* at 22-26.[52] The INS thus wrongly poses the conflict; it is not created by the judiciary's attempt to impose undue limits on the Attorney General but by the Attorney General's attempt to evade the permissible limits imposed by Congress. When the executive violates the mandate of Congress, the decisions of the Attorney General deserve no special deference.

Finally, the INS proffers one last deference argument, that respondent is a terrorist and that the judiciary should defer to the Attorney General's international cooperative efforts in that realm. Pet. Br. at 33. Petitioner, however, makes these assertions without affording Doherty an opportunity to rebut specific charges against him and present evidence at an asylum hearing. By denying Doherty the opportunity to be heard, the Attorney General has acted in disregard of the mandate of the Refugee Act and of the BIA rulings that compel careful fact-finding and the balancing of equities. *See Yiu Sing Chun v. Sava*, 708 F.2d at 876 (holding that "Congress's limitation on the Attorney General's discretion requires careful fact-finding"); *Matter of Riccio*, 15 I. & N. Dec. 548, 549 (BIA 1976) (holding that discretionary judgments must be based upon evaluation of all the facts and circumstances of particular case); *Matter of Vega*, 11

[52] The congressional goal of limiting executive authority in this area was made clear from the first hearings on the Refugee Act. *See* H.R. Rep. No. 608, *supra*, at 15 (quoting House hearings); *Admission of Refugees into the United States: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 59 (1977) (statement of Rep. Eilberg) (introducing legislation representing "an attempt to restore [congressional] authority and, at the same time, to establish a proper balance between the executive and the legislative branches of Government in establishing the appropriate procedures. . . .").

I. & N. Dec. 337, 339 (BIA 1965) (same). The Attorney General's extraordinary decision to deny asylum without a full and fair hearing stands in stark contrast to the careful and individualized requirements spelled out in the Refugee Act.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed.

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Petitioner,

v.

[redacted] DOHERTY,
Respondent.

[redacted]
[redacted] COURT OF APPEALS
[redacted] CIRCUIT

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INTEREST OF AMICUS

The International Human Rights Law Group ("IHRLG") is a non-profit legal organization that seeks to promote observance of international human rights. Founded in 1978, the IHRLG provides legal assistance and information in the field of international human rights law and has consultive status with the Economic and Social Council of the United Nations. In lawsuits raising questions of international human rights, the IHRLG provides legal advice with the assistance of private attorneys working on a pro bono basis.

This brief addresses a single issue: whether the Attorney General has the authority to deny asylum to a refugee on the grounds that (1) United States foreign policy supports the prompt and lawful punishment of those who commit

acts of violence against a democratic state, and (2) the deportation of this particular alien to the United Kingdom is in the foreign policy interest of the United States.

STATEMENT OF THE CASE

Mr. Doherty's brief sets out the facts of this case and the proceedings below. Mr. Doherty has applied for asylum in the United States. The Board of Immigration Appeals ("BIA") found that he made a prima facie showing that he has a "well-founded fear of persecution" if he is returned to the United Kingdom (Cert. App. 99a-100a) -- which would, if proved, make him a "refugee" for purposes of asylum under section 203(a) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1158(a) (1988). He has been denied a hearing at which to establish his claim that he would be persecuted if deported to the United Kingdom.

The United Kingdom has requested Mr. Doherty's extradition based on the fact that he was convicted in 1981 of killing a British Army officer in a gun battle between the Provisional Irish Republican Army and British troops in Northern Ireland. In December, 1984, the United States District Court for the Southern District of New York, after an evidentiary proceeding, denied extradition on the ground that the offense was "political" under the extradition treaty then in force between the United States and the United Kingdom.[1/]

[1/] See In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984).

The Department of Justice has not sought extradition in another forum. Instead, the Attorney General has attempted to effect Mr. Doherty's deportation to the United Kingdom without going through extradition procedures. In 1988, Attorney General Meese personally overturned Mr. Doherty's designation of Ireland as the country to which he should be deported -- the first time an Attorney General had ever exercised such authority -- and ordered Mr. Doherty deported to the United Kingdom (Cert. App. 116a).

After Mr. Doherty renewed his application for asylum, and the BIA concluded he had made a prima facie showing of fear of persecution, Attorney General Thornburgh -- again, for the first time ever -- personally overruled the BIA and denied asylum, finding in pertinent part:

> First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." Deporting respondent to the United Kingdom would unquestionably advance this important policy. Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom.

(Cert. App. 82a) (citations omitted).

The net result is that Mr. Doherty is denied asylum based on asserted "foreign policy interests" of the United States, and is to be sent to the United Kingdom, on the order of the Attorney General, even though the federal courts have denied extradition and even though Mr. Doherty has shown sufficient evidence of persecution to convince the BIA that, at least, a hearing is warranted at which he can attempt to prove it.

SUMMARY OF ARGUMENT

In an unprecedented decision, the Attorney General has claimed the authority to grant or deny asylum to a refugee based on an assessment of American foreign policy interests. In effect, he has asserted the right to turn the humanitarian remedy of asylum into a political and foreign policy tool that can be used to favor our allies and chastise our enemies. He has, moreover, attempted to use his control over deportation procedures to circumvent the judicial procedures and safeguards imposed on extraditions.

The Attorney General's position is wrong for several reasons. First, the novel claim that the Attorney General can base asylum decisions on foreign policy factors violates United States treaties

and international law. The Attorney General's actions are subject to both the United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, and to basic principles of the law of nations relating to asylum. The Protocol prohibits precisely the sort of political discrimination that the Attorney General has engaged in, and his interpretation is contrary to the express intent of Congress and the President at the time the Protocol was ratified. Moreover, asylum is understood by all civilized states to be a humanitarian remedy that must be available equally to all, and cannot be based on a desire to placate or provoke another government. The Attorney General's attempt to turn it into a system for exhibiting approval or disapproval of

particular regimes is contrary to those basic principles of the law of nations.

Second, the Attorney General's reliance on an alleged "foreign policy" favoring the punishment of violent criminals to deny asylum and justify deportation is an attempt to circumvent the restrictions on extradition imposed by Congress and by treaty, and to improperly effect, by executive order, an extradition that has been refused under the applicable treaty. There is no such "policy" favoring return of alleged criminals outside of U.S. extradition treaties and, moreover, the Attorney General cannot, on his own orders, effectively dispense with the judicial safeguards imposed on extradition.

Third, the Attorney General's belated claim of this authority is a new

and extraordinary construction, contrary to the existing practices of the BIA (which has consistently made these discretionary decisions based on neutral and humanitarian factors), to prior statements of the Departments of Justice and State, and to positions that the United States has previously taken in litigation.

For these reasons (and those advanced in other briefs in support of respondent), the Second Circuit's decision should be affirmed.

ARGUMENT

I. THE ATTORNEY GENERAL DOES NOT HAVE DISCRETION TO RELY ON POLITICAL OR FOREIGN POLICY FACTORS IN DENYING ASYLUM TO A REFUGEE

Petitioner argues that the Attorney General's discretion to admit individual refugees is unfettered (Pet. Br.

20, 22-23). It relies chiefly on isolated statements in this Court's prior decisions, which merely recognize that the Attorney General, in fact, has been granted discretion to admit refugees. Where petitioner errs is in leaping from the concept of "discretion" to that of "unlimited discretion."

Petitioner's statutory argument for "unfettered" discretion is based primarily on (1) the fact that foreign policy considerations were made specifically relevant by Congress in other provisions of the Refugee Act of 1980 (Pet. Br. 20-21); and (2) the assertion that because Congress limited the Attorney General's authority to grant asylum, it necessarily must have intended no limitation on the authority to deny asylum (Pet. Br. 20).

The former argument is dealt with at length in the briefs of Mr. Doherty and other amici, and will not be repeated here. As for the latter, petitioner cites only Bowen v. Yuckert, 482 U.S. 137, 148 (1987), but that reliance is misplaced. The Bowen Court specifically rejected the argument that a limitation on discretion to grant a claim somehow implies "unlimited authority to deny meritorious claims." Id. at 148 n.6.

A. The Attorney General's Discretion Must Be Exercised In Accord With The 1967 Protocol

The United States' international obligations regarding refugees and asylum are governed by the United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (the "Protocol"). As this Court has previously noted, the

Protocol binds the United States "to comply with the substantive provisions of Articles 2 through 34" (i.e., all of the substantive provisions) of the United Nations Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 150, reprinted in 19 U.S.T. 6259 (the "Convention"). See INS v. Stevic, 467 U.S. 407, 416 (1984).

The Protocol is a treaty of the United States, and as such is part of the "supreme law of the land." U.S. Const. art. VI, cl. 2; Air France v. Saks, 470 U.S. 392, 406 (1985). The brief of amicus United States Congress demonstrates that the intent of Congress in promulgating the Refugee Act of 1980 was to adjust United States law to the requirements of the Protocol.

As an executive official, the Attorney General must conform his actions to the laws and treaties of the United States. Any discretion granted him by Congress with respect to asylum must therefore be exercised in accordance with the Protocol. As this Court has previously noted, both Congress and the President, at the time the Protocol was ratified, expected that the Attorney General would exercise his discretion to conform his execution of our asylum laws to the Protocol, not to depart from it.[2/]

[2/] At the time the Senate ratified the Protocol it was expected that where United States practices conflicted with the Protocol, "the Attorney General would honor the requirements of the Protocol." Stevic, 467 U.S. at 429 n.22; see also id. at 417-18 ("apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language").

B. Discrimination Among Refugees For Political Purposes Violates The Protocol and the Convention

It is a fundamental principle of international refugee agreements -- and the starting point for both the Convention and the Protocol -- that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, art. 14(1), adopted Dec. 10, 1948, U.N. Doc. A/811.[3/] Article 14 of the Universal Declaration is not self-executing, but neither is it mere pious sentiment. The Convention itself expressly recognized the force of the Universal Declaration in its preamble, and "affirmed the principle

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[3/] This right does not apply "in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." Id.

that human beings shall enjoy fundamental rights and freedoms without discrimination." Convention, preamble, 19 U.S.T. at 6260. The international agreements at issue rely on the fundamental principles of fairness and equal treatment embodied in the Universal Declaration.[4/]

Thus, the preamble to the Protocol states that it is "desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention." Protocol, preamble, 19

[4/] As a State Department official testified, "The Protocol . . . is a determined effort by the United Nations to secure world-wide agreement that refugees everywhere must be given the protection and certain basic rights which are essential if they are to be given the chance to live as self-supporting and self-respecting human beings." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 5 (1968) (written statement of Laurence Dawson).

U.S.T. at 6225. To carry this out, the Protocol adopts a definition of "refugee" that is taken, with slight modification, directly from the Convention:

> [T]he term "refugee" shall . . . mean any person [who] . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

Protocol, art. I.2, 19 U.S.T. at 6225. This definition had previously been taken, in large part, from the Statute of the United Nations High Commissioner for Refugees, ch. VI.A (ii), G.A. Res. 428(V)

(1950) (the "UNHCR Statute").[5/] The definition in the UNHCR Statute was made part of a mission that the United Nations emphasized was to be "of an entirely non-political character," and would be "humanitarian and social." UNHCR Statute, ch. I.2.[6/]

[5/] The UNHCR Statute defines a refugee as "[a]ny person who, as a result of the events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country . . . ." UNHCR Statute, ch. VI.A.(ii).

[6/] It is significant that under the Protocol, the "non-political" and "humanitarian" Office of the High Commissioner is specifically delegated the "duty of supervising the application of the provisions of the Protocol." See Protocol, art. II.1, 19 U.S.T. at 6226.

Article I of the Protocol expressly states that its provisions "shall be applied by the States Parties hereto without any geographic limitation." Protocol, art. I.3, 19 U.S.T. at 6225.[7] Moreover, article 3 of the Convention -- specifically incorporated through the Protocol -- requires the United States and other signatories to "apply the provisions of this Convention to refugees

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[7] Under the Convention, parties could create a kind of geographic limitation by choosing one of two alternate definitions of "refugee": (a) those whose refugee status was caused by "events occurring in Europe before 1 January 1951," or (b) those whose refugee status was caused by "events occurring in Europe or elsewhere before 1 January 1951." Convention, art. 1.B.(1), 19 U.S.T. at 6262 (emphasis added). The Protocol permits states which were parties to the Convention -- a group that does not include the United States -- to retain their article 1.B.(1)(a) designation. Protocol, art. I.3, 19 U.S.T. at 6225.

without discrimination as to race, religion or country of origin." Convention, art. 3, 19 U.S.T. at 6264 (emphasis added). The importance of article 3 of the Convention is underscored by the fact that it is one of but five articles in the Convention to which no reservation is permitted by the Protocol. See Protocol, art. VII.1, 19 U.S.T. at 6228.

Prior United States law had imposed "geographical and ideological" limitations on asylum;[8] the Protocol's enactment, as Congress knew at the time of ratification, required elimination of what this Court has called these "unacceptable geographic and political distinctions." INS v. Cardoza Fonseca, 480

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[8] See H.R. Rep. No. 608, 96th Cong. 1st Sess. 1-5 (1979) (discussing history of these limitations).

U.S. 421, 435 (1987). As the Secretary of State informed the President when he forwarded a copy of the Protocol, "[T]he general approach of the Protocol is to provide that refugees in each acceding country . . . are to be treated without discrimination either as compared with other refugees, with other aliens or with nations." Letter of Submittal from Secretary of State Rusk to President Johnson, July 25, 1968, reprinted in 114 Cong. Rec. 27758 (1968).

To take "foreign policy" considerations into account in making asylum decisions is to, in effect, treat refugees differently based on the country from which they are fleeing or which is demanding their return. To treat aliens disparately based on such factors is to engage in discrimination prohibited under

article 3 of the Convention. To treat similarly situated aliens differently based on such grounds is to create precisely the kind of "geographic limitation" prohibited under article I.3 of the Protocol. Such conduct, moreover, deprives the alien of the "equal status" that the Protocol was designed to ensure.

Thus, the Attorney General's decision to let this country's relations with the United Kingdom determine the disposition of Mr. Doherty's asylum application is contrary to the letter and the spirit of the 1967 Protocol, and violates treaty obligations of the United States.

C. Reliance On Foreign Policy Interests In Making Asylum Decisions Is Contrary To Presidential And Congressional Intent Behind The Accession To The Protocol

The Attorney General's construction of the Protocol is also directly contrary to the foreign policy considerations that led to U.S. accession to the Protocol. Both the President and the Senate, in acceding to the Protocol, specifically intended to create a humanitarian remedy and to further the world standing of the United States as a humanitarian nation.

The Secretary of State, in sending the Protocol to the President, explained: "Accession to the Protocol would promote our foreign policy interests through reaffirming, in readily understandable terms, our traditional

humanitarian concerns and leadership in this field. It would also convey to the world our sympathy and firm support in behalf of those fleeing persecution." Letter of Submittal from Secretary of State Rusk to President Johnson, July 25, 1968, reprinted in 114 Cong. Rec. 27759 (1968).

The President, transmitting the Protocol to the Senate, stated, "United States accession to the Protocol would thus constitute a significant and symbolic element in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations; and to secure and preserve peace in the world." Letter of Transmittal from President Johnson to United States Senate, Aug. 1, 1968, reprinted in 114 Cong. Rec.

27758 (1968). The President also declared:

> It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.

Id. at 27757 (emphasis added).

In explaining the Protocol to the Senate, the Acting Deputy Director of the State Department's Office of Refugee and Migration Affairs stated, "The Department of State is convinced that United States accession to the Protocol . . . would enhance our foreign policy interests and our world image of humanity and concern for the individual." S. Exec. Rep. No.

14, 90th Cong., 2d Sess. 7 (1968) (hereinafter "1968 Senate Report") (statement of Laurence Dawson). He added:

> We think that the foreign policy interests that would be inherent in our accession form the basis for our strong recommendation that the United States accede. Those foreign policy interests are [first,] that they extend the image of the United States as a nation concerned with the persecuted and with the individual at a time when this is ever more important.
>
> Secondly, that it will enhance our diplomatic competence and our diplomatic effort to try to produce more and better acceptance of humane and civilized standards in other countries for refugees.

Id. at 10 (remarks of Acting Deputy Director Dawson).

In other words, it was the specifically humanitarian remedy that was deemed to be in the foreign policy interests of the United States. The ability to position the United States as a humanitarian nation was itself important to

"enhance our diplomatic competence and our diplomatic effort." Id.

The Attorney General's claim that he can bend the asylum procedures to reach other foreign policy objectives would vitiate the very benefit sought to be gained through accession to the Protocol: to announce to the world that United States asylum policy is humanitarian and fair. The Attorney General's construction simply cannot be squared with the intent behind U.S. accession to the Protocol.

D. Basing Asylum Decisions On Political Considerations Is Contrary To The Law of Nations

The Attorney General's construction is also contrary to the position that asylum holds in the law of nations. It has long been settled that general international law "is part of our law,"

and also is readily suited to judicial determination. Hilton v. Guyot, 159 U.S. 113, 163 (1895). It is, moreover, well-established that the Court should look to "the customs and usages of civilized nations" when evaluating the lawfulness of Executive action. See The Paquete Habana, 175 U.S. 677, 700 (1900).

It is a fundamental principle of international law that all states have the right to grant asylum. It is a concomitant principle that because asylum is a humanitarian remedy, not a political action, no state has the right to object to the grant of asylum by another.

The United Nations General Assembly declared, shortly before the United States' accession to the Protocol, that "the grant of asylum by a State to persons entitled to invoke article 14 of

the Universal Declaration of Human Rights is a peaceful and humanitarian act, and that, as such, it cannot be regarded as unfriendly by any other State." United Nations Declaration on Territorial Asylum, G.A. Res. 2312(XXII), preamble (1967) (emphasis added). A leading commentator explains:

> The granting of asylum is not in itself an unfriendly act, and this must necessarily also apply to the acceptance by the State granting asylum of the asylum-seeker's statement that he has suffered or is fearing persecution in his country of origin. It follows that a finding by the authorities of one State to the effect that persecution is taking place in the territory of another State, cannot be construed as a censure of the government of the latter State, and that such a finding does not constitute any interference or intervention in the domestic affairs of that State.

A. Grahl-Madsen, Territorial Asylum 12-13 (1980).

A major purpose of the Convention and the Protocol is, in fact, to minimize international tension over refugees. The signatories to the Convention expressed "the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between states." Convention, preamble, 19 U.S.T. at 6260 (emphasis added).

As Congress was informed at the time of U.S. accession, "[T]here could be no doubt that resolving refugee problems in these terms, in such humanitarian terms, will conduce not only to the well-being of the refugee but also to the reduction of international tensions, the stability of the countries into which the refugees flee, and ultimately and some-

times immediately the preservation of peace." 1968 Senate Report at 4 (remarks of Acting Deputy Director Dawson) (emphasis added).

The Attorney General turns this principle on its head. He claims the authority to subordinate the humanitarian remedy of asylum to a view of current foreign policy considerations. As a result, any future grant or denial of asylum could reasonably be read by the foreign government in question as a reflection of its standing in U.S. foreign policy.

An incident roughly contemporaneous with the Attorney General's 1989 decision illustrates the fallacy of his position. The Government of China was angered when the United States granted refuge in its Beijing embassy to two

prominent dissidents (who were sought for prosecution under valid Chinese criminal warrants), and also granted asylum to Chinese students in the United States in the wake of the Tianamen Square massacre in June, 1989.[9/] The United States granted asylum to the Chinese on humanitarian grounds, and under the law of nations the Chinese government had no legitimate grievance. "The fact that the country of origin of a refugee considers his very presence in the country of

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9/ The disputes over asylum to dissident leaders Fang Lizhi and Li Shuxian, and to Chinese students in the United States, are discussed generally in Scheffer, U.S. Embassy Makes a Risky Refuge, Wall. St. J., June 13, 1989, at A20, col. 3; Williams, Turmoil in China; Crackdown on Dissent; China Imposes New Curbs on Travel Abroad, L.A. Times, June 19, 1989, part 1, p. 1, col. 5; Sun, Stance of Chinese Government Disappoints Bush Administration, Wash. Post, Mar. 7, 1990, at A30.

asylum to be a great nuisance (or worse), cannot alter the picture and justify a demand for discontinuing asylum." A. Grahl-Madsen, supra, at 19.

The United Kingdom may consider Mr. Doherty's presence in the United States to be a nuisance, and that may cause some tension with an old ally. But under international law, the British (like the Chinese) have no right to take umbrage at a grant of asylum made on purely humanitarian grounds. If, however, the Attorney General can deny asylum to an allegedly British citizen[10/] because we have good relations with the United Kingdom, but grant it to a Chinese citizen because we disapprove of that government's actions, then the offended

[10/] Mr. Doherty has denied that he is a citizen of the United Kingdom.

government would be absolutely correct in claiming that the grant of asylum is an unfriendly act.

A construction of the Attorney General's discretion that would countenance a breach of the law of nations, and leave the United States open to justified condemnation or reprisals, should not be adopted unless it is clear that Congress intended that result. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (an act of Congress should never be construed to violate the law of nations if another reasonable construction is available); Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (same). Given the history of the United States' accession to the Protocol, outlined above, it is inconceivable that

Congress intended to give the Attorney General such discretion.

II. THE ATTORNEY GENERAL'S USE OF DEPORTATION TO ACCOMPLISH AN EXTRADITION IS IMPERMISSIBLE

All of the proceedings in this case, and both decisions of the Attorneys General, have been designed to accomplish the effective extradition of Mr. Doherty to the United Kingdom. Attorney General Thornburgh's decision is specifically based, in part, on this law-enforcement rationale: that United States foreign policy supports the prompt and lawful punishment of those who "commit acts of violence against a democratic state" (Cert. App. 82a). The Department of Justice has been very candid about this. On national television, one of the INS attorneys responsible for the case explained:

> It's quite clear that in the extradition proceeding the objective was to get Doherty to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that.

(App. 77.)

The fatal flaw in this position is that there is no American "foreign policy" that specifically favors return of criminals for punishment other than that expressed in the extradition treaties of this nation. Cf. Factor v. Laubenheimer, 290 U.S. 276 (1933) (a "policy" not embodied in the terms of an extradition treaty could not affect its scope). A Federal district judge has already determined that our treaty with the United Kingdom did not permit extra-

dition for the crimes charged.[11/] In re Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

The Attorney General's extraordinary argument is that American foreign policy demands the return of an alleged criminal to the United Kingdom when the extradition treaty between the two nations does not authorize it. He claims authority to circumvent the restrictions specifically included by the President and the Senate in the extradition treaty then in force with the United Kingdom.

11/ The Attorney General's failure to pursue extradition in another forum -- his obvious remedy for the initial denial -- may raise an inference that the Attorney General is not sure that the policy outlined in the extradition treaty really favors sending Mr. Doherty to the United Kingdom.

This Court has previously resisted attempts to evade the restrictions of the extradition statutes, even for ostensibly good causes like the punishment of criminals. As the Court noted in Johnson v. Browne, 205 U.S. 309 (1907), "the escape of criminals is, of course, to be very greatly deprecated," but "it is still most important that a treaty of this nature [extradition] between sovereignties should be construed in accordance with the highest good faith," and not be stretched by "doubtful construction of some of its provisions." Id. at 321.

Even more forcefully, this Court has rejected the idea that the Executive has the authority to achieve the extradition of alleged criminals on its own authority. It was nearly 200 years ago

that John Adams's administration engineered the delivery of a seaman in American custody, Jonathan Robbins, to authorities of the United Kingdom, who promptly hanged him for murder.[12/] The Robbins affair has some parallels with this one. Robbins (who was probably an Irishman and a British subject) claimed to have been unlawfully impressed into service on a British warship. He allegedly helped lead a mutiny against a concededly brutal captain, and killed a British officer in the process. Robbins was viewed by some in America as a hero who resisted British tyranny, but was

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12/ The details of the Robbins affair are set out in Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990).

seen by others as a pirate, a traitor, and a murderer.[13/]

The Adams administration was widely viewed as having manipulated the extradition process to achieve delivery of Robbins to Great Britain. As this Court noted a half-century later, the public outcry over the Adams administration's "assumption of power to arrest, imprison, and extrude [a fugitive] on executive warrants" led directly to the administration's downfall. In re Kaine, 55 U.S. (14 How.) 103, 112-13 (1852) (plurality opinion). More important, since "a great majority of the people of this country were opposed to the doctrine that the president could arrest, imprison, and surrender a fugitive, and

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13/ See generally Wedgwood, supra, note 12.

thereby execute the Treaty [with Great Britain] himself," Congress enacted the forerunner of the present extradition statute under which, "from that day to this, the judicial power has acted in cases of extradition . . . independent of executive control." Id. at 112. See 18 U.S.C. § 3184 (1988) (committing authority over extradition proceedings to judges and justices of federal and state courts and magistrates authorized by them).

Since the 18th Century, no administration has argued that it can, on executive writ, extradite an alleged felon to a foreign country. But the Attorney General here is claiming the equivalent authority to manipulate the deportation laws to effectively return an alleged malefactor to a foreign govern-

ment for the express purpose of imposing punishment -- without the safeguards and judicial review imposed by Congress through extradition treaties and procedures.

This Court has long recognized that "an extradition without an unbiased hearing before an independent judiciary" is "highly dangerous to liberty, and ought never to be allowed in this country." Kaine, 55 U.S. at 113. The Attorney General's extraordinary attempt to arrogate to himself the power to make such decisions must be rejected.

III. THE ATTORNEY GENERAL'S CONSTRUCTION IS CONTRARY TO THE PRIOR POSITIONS OF THE JUSTICE DEPARTMENT AND OTHER EXECUTIVE AGENCIES

The Attorney General's claim that he can deny asylum based on political or foreign policy considerations is also

contrary to the prior practice of the INS, to repeated prior statements made by the Executive Branch, and to the positions repeatedly taken by the Executive in litigation. These earlier actions demonstrate both the unprecedented nature of the Attorney General's construction and its complete lack of basis in statute, treaty, or history.

Since enactment of the Refugee Act of 1980, the BIA has repeatedly faced discretionary asylum determinations. It has not automatically granted asylum to all who are eligible, yet it has certainly not engaged in political judgments as to which foreign governments we most want to offend or appease. On the contrary, it has applied a consistent series of neutral and humanitarian criteria to the issue of who should be

granted asylum in this country. Among the factors it considers are: (1) whether the alien passed through other countries on the way to the United States; (2) whether orderly refugee procedures were available in those other countries; (3) the alien's living conditions, safety, and potential for long-term residence in another country; (4) whether the alien has relatives legally in the United States or other personal ties to this country; (5) whether the alien engaged in fraud to circumvent orderly immigration procedures; (6) general humanitarian concerns, such as the tender age or poor health of the alien; and (7) whether the alien meets the asylum standard (well-founded fear of persecution) but cannot meet the higher standard for withholding of deportation.

See In re Pula, Interim Dec. No. 3033 (BIA, Sept. 22, 1987). The Board has created a presumption that "[i]n the absence of any adverse factors . . . asylum should be granted in the exercise of discretion." Id.

It is true that no individual refugee has a right to asylum in the United States, and not all who apply can be given asylum here. The BIA's criteria seek to determine which individuals are, on their own merits and in the application of neutral and humanitarian criteria, most deserving. The Board has never suggested that its decisions ought to be influenced by whether the United States is for or against a particular regime. Petitioner does not explain how the criteria developed by the Board and

heretofore applied are erroneous or insufficient.[14/]

Many have charged over the years that the Government has improperly based asylum decisions on politics, not on humanitarian concerns. See generally Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess., (1989) (hereinafter, "1989 Hearings"); Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 17 U. Mich. J.L. Ref. 243 (1984). Many lawsuits alleging bias have been brought; on at least one occasion, the INS has

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14/ One unexplained aspect of the Attorney General's decision is whether these "foreign relations" judgments are now to be made by the BIA judges, or are reserved to him personally.

been adjudged to be discriminating against individuals from particular nations. See Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1502 (C.D. Cal. 1988), aff'd, 919 F.2d 549 (9th Cir. 1990).

Yet the Attorney General has apparently never defended these actions on the ground that he is entitled to take political or foreign policy considerations into account. On the contrary, both the Department of Justice and the Department of State have frequently asserted that they do not discriminate based on such factors. In 1989, INS Commissioner Nelson denied that the Attorney General had created a policy favoring Nicaraguan refugees, testifying that "our basic policy that we have been trying to follow and certainly following [sic] at this point is trying to treat

everybody the same." 1989 Hearings at 69. At the same hearings, Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs Paula Dobriansky asserted:

> We apply these standards fairly to applicants from all countries. On occasion, our immigration policy has been criticized, with claims that foreign policy considerations have governed the granting of asylum. In fact, we do not have a nation-specific approach, but rather, apply the same standards to aliens from all countries including those from El Salvador and Nicaragua.

1989 Hearings at 55.

Before this Court, in Jean v. Nelson, 472 U.S. 846 (1985), the INS defended against charges it improperly discriminated against Haitians in the context of parole, not by arguing that it had discretion to discriminate, but by arguing that it did not discriminate. And in American Baptist Churches v.

Thornburgh, No. C-85-3255RFP (N.D. Cal. 1991) (discussed in briefs of other amici) the Justice Department conceded that political factors should not be taken into account in determining refugee status.

Yet the Attorney General is arguing here that, yes, he can make discriminatory decisions if he chooses to. This position is at odds with virtually every other public pronouncement on the subject by the political branches. Not only is it, therefore, not entitled to any substantial deference, see Cardoza Fonseca, 480 U.S. at 446 n. 30 (new interpretation which conflicts with earlier construction is entitled to "[c]onsiderably less deference"), it is plainly wrong.

CONCLUSION

For the reasons set forth above and in the other briefs in support of Mr. Doherty, the Second Circuit's reversal of the Attorney General's determination of June 30, 1989, should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JOSEPH PATRICK DOHERTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-925

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JOSEPH PATRICK DOHERTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS

This brief is submitted *amicus curiae* by the Office of the United Nations High Commissioner for Refugees, with the consent of the parties.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other per-

sons within its mandate [1] and of seeking durable solutions to the problems of refugees by assisting governments and private organizations.[2] The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, *inter alia*:

> "Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. . . ." [3]

The supervisory responsibility of UNHCR and the obligation of States to cooperate with UNHCR are formally recognized in Article II, paragraph 1, of the 1967 United Nations Protocol relating to the Status of Refugees (1967 Protocol), to which the United States became a Party in 1968:

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[1] Persons falling within the competence of the High Commissioner include refugees, asylum-seekers, and certain other persons in refugee-like situations. *See* U.N. General Assembly Res. 428(V) 1950; Annex: Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), ¶ 6 n.1. In the instant case, the Attorney General has "assumed, *arguendo*, that respondent satisfied the threshold eligibility requirement of being a refugee." Petitioner's Reply Brief (Pet. Reply Brief) at 6 n.1. In granting Mr. Doherty's motion to reopen his asylum proceedings, the Board of Immigration Appeals (BIA) concluded that he had established a *prima facie* claim of a well-founded fear of persecution. Petition App. 99a. For these reasons also, Mr. Doherty is a person of concern to UNHCR. However, because Mr. Doherty has not yet been afforded an opportunity to present the facts of his refugee claim in the usual procedure of a hearing before an immigration judge, and therefore has not actually had his refugee status determined, UNHCR takes no position on the specific facts of this case or on the particular merits of Mr. Doherty's claim of refugee status.

[2] UNHCR Statute at ¶ 1.

[3] *Id.* at ¶¶ 8(a) and (d).

> "The States Parties to the present Protocol undertake to cooperate with the Office of the [UNHCR] . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol." [4]

The present case, concerning as it does the interpretation of statutory provisions and international treaty obligations deriving from the 1951 Convention relating to the Status of Refugees (1951 Convention), through the 1967 Protocol, raises questions involving the essential interests of refugees within the mandate of the High Commissioner. Its resolution is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum and withholding of deportation to those who qualify for such status.

Moreover, the decision in this case—particularly if the Court finds it necessary to reach the question of whether the Attorney General may properly consider foreign policy in denying asylum—can be expected to influence the manner in which the authorities of other countries make asylum decisions and apply international instruments and principles related to refugee protection. A decision by this Court broadly authorizing the interjection of foreign policy concerns as a basis for denying asylum or avoiding obligations set out under the 1951 Convention can be expected to undermine the international recognition of the social and humanitarian nature of the problem of refugees and to impede the ability of the High

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[4] Protocol relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. Under Article I(1) of the 1967 Protocol, the United States has agreed to apply Articles 2 to 34 inclusive of the 1951 United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Petitioner has acknowledged that the relevant provisions of the 1951 Convention are binding upon the United States as a result of this country's accession to the 1967 Protocol. See Petitioner's Brief on the Merits (Pet. Brief) at 30.

Commissioner to fulfill her mandate to provide for the international protection of refugees.

For these reasons, UNHCR respectfully submits this brief in support of the interpretation of the relevant statutory provisions and international treaty obligations deriving from the 1951 Convention and 1967 Protocol that was adopted by the United States Court of Appeals for the Second Circuit in the decision below.

SUMMARY OF ARGUMENT

Petitioner claims that a primary issue in this case is whether the Attorney General may base asylum decisions on foreign policy criteria. In this brief, UNHCR will demonstrate that it is both premature and unnecessary for the Court to reach this issue. Rather, the issue here is whether the Respondent should receive a hearing and an opportunity to present the facts of his claim for asylum and withholding of deportation prior to any determination that he is ineligible for such protection.

We argue below that the Court of Appeals correctly remanded this case for a hearing. Such a hearing will provide a proper basis for the authorities to determine whether Respondent is a refugee or is excluded from the protection of the 1951 Convention because of his past conduct. The 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act already provide the analytical framework for excluding undeserving individuals from the protection afforded refugees. If this Court affirms the Court of Appeals on this basis, it need not reach the issue of the Attorney General's power to base asylum decisions on foreign policy concerns.

Even if the Court upholds the Attorney General's determinations without a hearing, which it should not, it is totally unnecessary to reach the foreign policy issue. If Respondent is not eligible for withholding of deportation on either of the two grounds cited by the Attorney

General, he effectively would be excluded from asylum as well.[5]

This brief will show first that, pursuant to international law and well-established international standards, asylum-seekers are entitled to present their individual claims at a meaningful hearing. Respondent should be accorded such a hearing.

Second, UNHCR will demonstrate that since the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980 provide the analytical framework to determine whether past conduct excludes a person from refugee status and therefore asylum, it is not necessary for this Court to authorize the politicization of asylum determinations in order for the Attorney General to deny asylum to undeserving individuals.

Finally, this brief will show that the international protection of refugees established by the 1951 Convention and the 1967 Protocol is based exclusively on non-political criteria. The letter and spirit of the Convention, the Protocol, and related international instruments and standards are based on the principle that the recognition of refugee status and the grant of asylum are peaceful, non-political, and humanitarian acts that cannot be regarded as unfriendly by any State. In other words, States should not treat the granting of asylum as an act implicating foreign policy concerns. Moreover, the international system established to protect refugees will be substantially undermined if governments deny asylum based on foreign policy criteria. For these reasons, foreign policy considerations are not a proper basis for denying asylum.

The decision of the Court below should, therefore, be affirmed.

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[5] Although the instant case involves an individual convicted abroad of murder, the broad authority which Petitioner seeks from this Court to interject "foreign policy concerns" into asylum determinations could affect untold numbers of asylum-seekers whose claims are not so provocative or complex.

ARGUMENT

I. THE COURT BELOW CORRECTLY DETERMINED THAT RESPONDENT SHOULD RECEIVE A HEARING SINCE, UNDER INTERNATIONAL LAW AND WELL-ESTABLISHED INTERNATIONAL STANDARDS, AN ASYLUM-SEEKER IS ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE REFUGEE STATUS AND ELIGIBILITY FOR INTERNATIONAL PROTECTION.

In granting Respondent a hearing on his claims for asylum and withholding of deportation, the Board of Immigration Appeals (BIA) stated:

> "The [Immigration and Naturalization] Service has alleged that the Respondent has engaged in conduct which renders him either ineligible for withholding or unworthy of the benefit of asylum. The Service will have the opportunity to prove its allegations upon reopening of the proceedings."

Petition App. 100a. In reversing the BIA decision, the Attorney General denied Respondent a hearing because he concluded *inter alia* that Respondent was ineligible for withholding of deportation based largely on evidence introduced in the asylum case of another individual. *See* Petition App. 85a. Under international law and widely accepted procedural standards, however, an asylum-seeker is entitled to an evidentiary hearing.

A. This Court has Found that Congress Intended to Conform United States Law to the Provisions of the 1951 Convention and the 1967 Protocol.

In 1968, the United States acceded to the 1967 Protocol.[6] It is axiomatic that, in passing the 1980 Refugee Act,[7] Congress intended to conform United States domestic

[6] As of 28 May 1991, 107 States were parties to the 1951 Convention and/or the 1967 Protocol.

[7] Pub. L. No. 96-212, 94 Stat. 102, *et seq.*

law with its international obligations under the 1967 Protocol and directed that it should be interpreted consistently with that international instrument. This Court itself has concluded:

> "If one thing is clear from the legislative history of the new definition of 'refugee,' *and indeed the entire 1980 Act*, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968."

Immigration and Naturalization Service v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987) (emphasis added).[8]

The changes worked by the 1980 Refugee Act were fundamental. First, Congress redefined "refugee" to "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the 1951 United Nations Refugee Convention and Protocol. . . ."[9] Second, responding to developing international standards and refugee needs, Congress incorporated an asylum provision in the legislation for refugees who meet this international definition.[10]

[8] This would be the case even in the absence of express Congressional intent, since the statute must be construed consistently with international law. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (the statute "ought never be construed to violate the law of nations, if any other possible construction remains").

[9] H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9; S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19. For similar contemporary statements, see *Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 96-781, 96th Cong., 2nd Sess. (1980) at 19; S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 4.

[10] H.R. Rep. No. 96-608, *supra*, at 17-18.

The language chosen by Congress in 1980 to define "refugee" tracks virtually verbatim the corresponding provisions of the 1967 Protocol. *Cardoza-Fonseca*, 480 U.S. at 437; compare 19 U.S.T. 6261, T.I.A.S. No. 6577, with Section 101(a)(42)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A) (1991). By establishing a remedy of asylum based on this definition,[11] Congress clearly intended to make U.S. refugee and asylum law consistent with its international obligations.[12]

There can be no doubt, then, that the refugee laws at issue in this case must be interpreted consistently with the provisions of the 1951 Convention and the 1967 Protocol.

B. The Definition of "Refugee" Contained in the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980 Requires an Individualized Assessment of Refugee Status.

The 1951 Convention and 1967 Protocol represent the international community's legal, social and humanitarian response to the plight of refugees. With these treaties, the international community agreed upon a universal and individualized definition of "refugee."

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[11] Section 208(a) of the INA, 8 U.S.C. § 1158(a), provides that an applicant "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that [the applicant] is a refugee within the meaning of section 1101(a)(42)(A)."

[12] As this Court observed in *Cardoza-Fonseca*, the Conference Committee Report "stated that the definition was accepted 'with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.' S. Rep. No. 96-590, p. 29 (1980); see also H.R. Rep. 9." *Cardoza-Fonseca*, 480 U.S. at 437.

An essential element of the definition is the individual's well-founded fear of persecution.[13] The individualized character of the definition is paramount:

> "The phrase 'well-founded fear of being persecuted' is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories . . . [with] the general concept of 'fear' for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements . . . ." [14]

In this way, the definition itself requires that the authorities assess an individual's claim to refugee status on the basis of that person's fear. As a recognized authority on international refugee law has noted, the refugee definition "is essentially individualistic, requiring a case by case examination of subjective and objective elements." [15]

Such an individualized assessment can only occur after an applicant has presented the facts of his claim in as complete a manner as possible.

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[13] The asylum-seeker's individualized fear of persecution is relevant to the threshold determination of whether he satisfies the requirements of the definition, including the determination of whether he is excluded from the definition because of past conduct. *See* G.S. Goodwin-Gill, *The Refugee in International Law* 61-62 (1983) (in the context of exclusion from refugee status and its concomitant legal protection, "the claim to be a refugee can rarely be ignored, for a balance must also be struck between the nature of the offence committed and the degree of persecution feared").

[14] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) ¶ 79.

[15] Goodwin-Gill, *supra*, at 6.

C. Well-Established International Standards Require that an Asylum-Seeker be Given an Evidentiary Hearing to Determine Refugee Status and Eligibility for International Protection.

Under widely accepted procedural standards, determination of refugee status and eligibility for international protection require a full opportunity for presentation of the facts underlying Respondent's claims. Because no hearing has been provided and no proper factual record developed, substantial questions of fact regarding Respondent's eligibility for refugee status and its accompanying protection remain unanswered.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)* (1979) delineates standards and basic procedural safeguards for determining refugee status and the concomitant eligibility for international protection.[16] Both the UNHCR *Handbook* and the Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme (Executive Committee Conclusions)[17] make clear that the refugee definition set out in the 1951 Convention and 1967 Protocol would be rendered virtually meaningless unless asylum-seekers are given full opportunity to present their claims.

The process of refugee status determination occurs in two stages.[18] First, "it is necessary to ascertain the relevant facts of the case. Secondly, the definitions of the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained." [19]

In guiding States on how to "ascertain the relevant facts," the entire second part of the *Handbook*, ¶¶ 189-219, is devoted to emphasizing the requirement of fair procedures in refugee and asylum determinations. Although it is left to each State "to establish the procedure that it considers most appropriate," [20] the *Handbook* sets

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[16] The *Handbook* was prepared by UNHCR at the request of States Members of the Executive Committee of the High Commissioner's Programme (Executive Committee) for the guidance of governments. *See* Executive Committee Conclusions No. 8 (XXVIII), Report of the 28th Session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC. 96/549 (1977) at ¶ 53.6(g). The *Handbook* is based on UNHCR's experience, including the practices and procedures of States and the UNHCR Office in determining refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over many years. *Handbook*, at 1. It has been widely circulated, and applied by governments and in many judicial decisions, including decisions of this Court. *See* Report of the 30th Session, UN Doc. A/AC. 96/572 (1979) at ¶¶ 68, 72(i)(L); Report of the 31st Session, UN Doc. A/AC. 96/588 (1980) at ¶ 36. As this Court has observed, "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (citations omitted). Both the U.S. courts and the BIA have frequently turned to the *Handbook* for guidance in the interpretation of the 1967 Protocol. *See, e.g., Canas-Segovia* v. *I.N.S.*, 902 F.2d 717, 721, 724-25, 729 (9th Cir. 1990); *Ananeh-Firempong* v. *I.N.S.*, 766 F.2d 621, 626, 628 (1st Cir. 1985); *Matter of Izatula*, Int. Dec. 3127 (BIA 1990); *Matter of Frentescu*, 18 I&N 244 (BIA 1982).

[17] The Executive Committee Conclusions, customarily adopted by consensus of the 44 States members (including the U.S.), evidence an important measure of State support for particular protection practice and standards, and contain international guidelines which can serve as a basis for States when developing or orienting their national policies on refugee issues.

[18] However, entitlement to international protection accrues as soon as an individual fulfills the criteria contained in the refugee definition, which necessarily occurs prior to the time at which refugee status is formally determined by a State or other competent authority. *Handbook* ¶ 28.

[19] *Id.* at ¶ 29.

[20] *Id.* at ¶ 189. UNHCR expresses no opinion on the applicability of *I.N.S.* v. *Abudu*, 485 U.S. 94 (1988) to this case except to note that the Executive Committee has advised that claims for

out the minimum procedural safeguards that will enable the necessary facts to come to light.

First, all applicants for refugee status should be given the necessary facilities to present their claims.[21] "The relevant facts of the individual case will have to be furnished in the first place *by the applicant himself*."[22] "[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application." [23]

Thus, the principles and methods discussed by the *Handbook* concentrate on burden of proof and credibility —evidentiary matters that would be wholly irrelevant if a hearing were not a necessary part of the refugee and asylum determination process.

Even in approaching manifestly unfounded claims, the Executive Committee concluded that "as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview. . . ." [24] Here, where the BIA determined that Respondent demonstrated a *prima facie* claim, Petition App. 99a, *a fortiori* Respondent should have the opportunity to present the facts of his case.

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asylum should not be foreclosed or rejected on formalistic grounds. Executive Committee Conclusions No. 15 (XXX), Report of the 30th Session of the High Commissioner's Programme, U.N. Doc. A/AC. 96/572 (1979) ¶ 72.

[21] *Handbook* ¶ 192.

[22] *Id.* at ¶ 195 (emphasis added).

[23] *Id.* at ¶ 196.

[24] Executive Committee Conclusions No. 30 (XXXIV), Report of the 34th Session of the High Commissioner's Programme, UN Doc. A/AC. 96/631 (1983).

In this instance, the Attorney General appeared to treat Mr. Doherty's refugee determination as if it were a criminal action where "probable cause" based largely on information supplied by persons other than the alleged criminal may be sufficient to issue a warrant for arrest.[25] But that approach does not conform to international procedural standards for the determination of refugee status.

United States asylum procedure implements an international law based on humanitarian principles. This law, *inter alia*, prohibits Contracting States from expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." [26] It is a law under which the applicant should be given the benefit of the doubt as to proof:

> "After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above . . . it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt." [27]

In sum, refugee status and asylum cannot be decided in the absence of an opportunity for a full presentation of the claim by the asylum-seeker to the proper authorities. Even "the non-fulfillment of . . . formal require-

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[25] The Attorney General relied heavily on evidence submitted in two decisions concerning a different asylum-seeker, *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984) and *McMullen* v. *I.N.S.*, 788 F.2d 591 (9th Cir. 1986). Petition App. 85a. That evidence has not been introduced in this case.

[26] Article 33(1) of the 1951 Convention.

[27] *Handbook* ¶ 203.

ments should not lead to an asylum request being excluded from consideration." [28]

Accordingly, Respondent should be given the opportunity to present his claim for asylum and withholding of deportation in a hearing before an Immigration Judge.

II. IT IS UNNECESSARY FOR THIS COURT TO AUTHORIZE THE POLITICIZATION OF ASYLUM DETERMINATIONS IN ORDER FOR THE ATTORNEY GENERAL TO DENY REFUGEE STATUS AND ASYLUM TO UNDESERVING INDIVIDUALS.

A. Under the 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act, Determination of Refugee Status First Requires an Individualized Analysis of Whether the Asylum-Seeker Satisfies the Inclusion Clauses of the Refugee Definition; No Such Determination Has Yet Been Made Here.

The Attorney General assumed for the purposes of this case that Mr. Doherty "satisfied the threshold eligibility requirement of being a refugee," as the BIA had found. Petition App. 82a-83a; Pet. Reply Brief at 6 n.1. However, no determination has yet been made as to whether Respondent actually satisfies the requirements of the Convention's inclusion clauses [29] or as to the degree of persecution which he can establish. The importance of this determination—both to the integrity of the procedure and to the ultimate determination of whether he should be excluded from refugee status—cannot be understated.

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[28] Executive Committee Conclusions No. 15, *supra*.

[29] The refugee definition consists *inter alia* of "inclusion" and "exclusion" clauses. The inclusion clauses provide the positive criteria of the definition (*i.e.*, fear of persecution on account of the five enumerated grounds). The exclusion clauses have a negative significance and enumerate the circumstances (*i.e.*, commission of certain crimes or acts) in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses. *Handbook* ¶¶ 30-31.

Without satisfying the inclusion clauses, Respondent *ab initio* is not entitled to protection under the Convention and the Protocol. If he does satisfy the inclusion clauses, the degree of persecution which he can establish must be balanced against his past conduct to determine whether he should be excluded from refugee status and its accompanying rights and benefits.[30]

The asylum-seeker must show that, owing to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," he is outside the country of nationality and unable, or owing to such fear, unwilling to avail himself of the protection of that country.[31]

Such a determination should be made in the first instance. As the UNHCR *Handbook* explains, this analysis should be conducted even for persons who have resorted to force or committed acts of violence:

> "An application for refugee status by a person having, or presumed to have, used force or committed acts of violence must in the first place—like any other application—be examined from the standpoint of the inclusion clauses in the Convention." [32]

In short, to determine whether an applicant for refugee status is undeserving of protection, an initial determination based on a full presentation of the facts should be made as to whether that individual satisfies the requirements of the inclusion clauses. That initial determination has not yet been made in this case.[33]

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[30] *Id.* at ¶¶ 152, 156; *see* Goodwin-Gill, *supra*, at 61-62.

[31] Art. 1(A)(2) of the 1951 Convention.

[32] *Handbook* ¶ 176.

[33] The BIA determination that Respondent demonstrated a *prima facie* claim based on a well-founded fear of persecution was made in the context of Respondent's motion to reopen his asylum proceedings. However, no hearing on the merits was conducted.

B. Under the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980, Determination of Refugee Status Requires an Analysis of Whether the Asylum-Seeker is Undeserving of Such Status Based on Past Conduct and Therefore Effectively Excluded from Withholding of Deportation and Asylum.

The Attorney General denied withholding of deportation in this case based on his determination that: (1) there were serious reasons for considering that Mr. Doherty had committed a serious non-political crime, and (2) Mr. Doherty had assisted, or otherwise participated, in the persecution of others on account of political opinion. Petition App. 88a-89a.[34] In reaching this decision without a hearing, the Attorney General relied heavily on evidence introduced in the case of another asylum applicant. Petition App. at 84a-85a.[35]

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[34] The mandatory relief of withholding of deportation under Section 243(h) of the INA, 8 U.S.C. § 1253(h), is the domestic law analogue to Article 33(1) of the 1951 Convention, which proscribes the return (*"refoulement"*) of a refugee to a territory where his life or freedom would be threatened on account of any of the five grounds enumerated in the refugee definition. The statute lists four grounds in paragraph 2 upon which individuals are not entitled to this relief. Paragraphs 2(B) and 2(D) duplicate the grounds found in Article 32(2) of the 1951 Convention. The Attorney General did not rely on these grounds in denying withholding of deportation to Mr. Doherty. Rather, he based his decision on Paragraphs 2(A) and 2(C).

Paragraph 2(A) of the withholding provision excludes those who participate in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion. This provision corresponds generally to the kind of acts contemplated under the Convention's exclusion clauses 1(F)(a) and (c) concerning crimes against peace and humanity, war crimes, and acts contrary to the purposes and principles of the United Nations.

Paragraph 2(C) is identical to the Convention's exclusion clause 1(F)(b) relating to serious non-political crimes.

[35] However, like analysis under the inclusion clauses, any determination that an asylum-seeker is excluded from refugee status and its accompanying rights and benefits also requires an individualized hearing of the claim. The Court of Appeals properly recognized this:

> "Considering the types of issues raised by Doherty's claim for withholding of deportation, the need for an evidentiary hearing should be obvious. His ultimate success or failure will depend on, among other factors, whether his crimes in Northern Ireland are judged "political" or "non-political", and whether he "persecuted" others on account of their political views or was himself the victim of such persecution. Needless to say, these issues all raise formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record."

Petition App. 16a-17a.

Both the 1951 Convention and U.S. law provide a methodology for excluding undeserving persons from refugee status. If a full presentation of the facts in this case reveals that Mr. Doherty properly falls under one of these exclusion grounds, he effectively would be excluded from withholding of deportation and asylum.

Under U.S. law, neither withholding of deportation nor refugee status (and thus asylum) is available to those who persecuted others as defined by the statute. Section 243(h)(2)(A) of the INA, 8 U.S.C. § 1253(h)(2)(A); Sections 101(a)(42) and 208(a) of the INA, 8 U.S.C. §§ 1101(a)(42) and 1158(a). Individuals also are ineligible for withholding of deportation under U.S. law if there are serious reasons for considering that they committed a serious non-political crime outside the United States prior to arrival. Section 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C). Although the asylum provision of U.S. law does not explicitly provide for this basis of exclusion, Article 1(F)(b) of the 1951 Convention does.

The Attorney General's opinion focused especially on this second exclusion ground regarding serious non-political crimes. The purpose of this exclusion ground, according to international guidelines, is twofold: (1) to protect the community of a receiving country from the danger of admitting a person who has committed a serious common

crime, and (2) to render due justice (*i.e.*, permit the grant of refugee status) to one who has committed a political offense or a less serious common crime.[36]

A central question regarding this exclusion ground here is what constitutes a "non-political" offense. This inquiry is fact-intensive. The *Handbook* provides the following guidance:

> "In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature."
>
> "In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him." [37]

The aim of this exclusion ground, then, is "to obtain a humanitarian balance between a potential threat to the community of refuge and the interests of the individual who has a well-founded fear of persecution." [38] As one commentator has observed, a person "should only be excluded from refugee status if the crimes committed are

[36] *Handbook* ¶ 151.

[37] *Id.* at ¶¶ 152, 156; *see* Goodwin-Gill, *supra*, at 61-62.

[38] Goodwin-Gill, *supra*, at 63.

so serious that the criminal character of the person outweighs his refugee character." [39]

In sum, the analytical framework established by the 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980 already provides the mechanism for determining whether Respondent is excluded from international protection based on past conduct.[40] If the facts ultimately disclose that Respondent participated in the persecution of others under Section 243(h)(2)(A), he would be ineligible for withholding of deportation and asylum under U.S. law, and excluded from refugee status under the 1951 Convention. If ultimately it is determined that there are serious reasons for considering that Respondent committed a serious non-political crime under Section 243(h)(2)(C) which outweighs the degree of persecution feared, he would be ineligible for witholding of deportation, and excluded from refugee status under Article 1(F)(b) of the Convention.

Thus, it is unnecessary for the Attorney General to turn to foreign policy criteria in order to deny asylum to undeserving individuals.

III. THE INTERNATIONAL PROTECTION OF REFUGEES ESTABLISHED BY THE 1951 CONVENTION AND 1967 PROTOCOL IS BASED EXCLUSIVELY ON NON-POLITICAL CRITERIA AND WILL BE UNDERMINED IF GOVERNMENTS DENY ASYLUM ON FOREIGN POLICY GROUNDS.

A. The Protection System Established by the International Refugee Instruments is Based Exclusively on Non-Political Criteria.

While it is unwarranted for this Court to determine whether the Attorney General has the power to make asylum decisions based on foreign policy grounds, if the

[39] 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 297 (1966) (citation omitted).

[40] Due to the serious consequences of exclusion, these clauses must be interpreted in a restrictive manner. *Handbook* ¶¶ 149, 180.

Court chooses to reach this issue, it should affirm the Court below.

Petitioner argues that, since the 1951 Convention and 1967 Protocol do not obligate a Party to grant asylum but only to withhold deportation (*"refoulement"*) to the country of persecution, a State may base its asylum decisions on foreign policy grounds. Pet. Brief at 24-25.

Such a position renders virtually meaningless the politically neutral international definition of "refugee." The Court of Appeals has correctly characterized the non-political character of refugee determinations as follows:

> "Under the protocol and the convention, a person's status as a 'refugee' was determined without regard to political considerations or the country from which the person fled."

Petition App. 20a. It is clear that foreign policy considerations are not a factor in the application of the humanitarian definition of "refugee" under these international instruments.[41]

In their catalogue of refugee criteria, the 1951 Convention and 1967 Protocol set forth no foreign policy ground on which an individual would be either eligible or ineligible for refugee protection. Not even Article 1(F), which provides grounds for excluding an undeserving individual from the protection afforded by the 1951 Convention, contemplates foreign policy concerns among those grounds.

Moreover, because "[t]he purpose of any definition or description of the class of refugees is to facilitate, and to justify, aid and protection . . . ," [42] such a position also eviscerates the purpose and function of the 1951 Convention and 1967 Protocol. In his 1990 Note on International Protection, the High Commissioner emphasized

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[41] *See* Article 1(A)(2) of the 1951 Convention.

[42] Goodwin-Gill, *supra*, at 2.

"that being a refugee and enjoying asylum are inextricably linked. . . . The institution of asylum is thus of critical importance for refugee protection . . . ." [43]

Article 14 of the Universal Declaration of Human Rights plainly states that "everyone has the right to seek and to enjoy . . . asylum from persecution." [44] In its 1977 Conclusions, the Executive Committee expressly appealed to governments to follow liberal practices in granting asylum, an appeal repeated the following year.[45]

The Convention's provision for assimilation and naturalization, which this Court has said corresponds to the asylum provision in U.S. law, *Cardoza-Fonseca*, 480 U.S. at 441, contemplates that parties "shall as far as possible facilitate the assimilation and naturalization of refugees." [46] That is, the Convention looks to a system that resolves the refugee problem *inter alia* at the point of asylum, rather than one which excludes refugees from the grant of asylum based on a ground contraindicated by the international instruments relating to refugees.[47]

In establishing a non-political and humanitarian system, the international community recognized that the

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[43] UN Doc. A/AC. 96/750 (27 August 1990) at ¶¶ 13-14.

[44] Universal Declaration of Human Rights, U.N. General Assembly Resolution 217 A (III), 10 December 1948.

[45] *See* Executive Committee Conclusions No. 5 (XXVIII), *supra*; Executive Committee Conclusions No. 11 (XXIX), Report of the 29th Session of the High Commissioner's Programme, UN Doc. A/AC. 96/559, ¶ 68.1(d). *See also* Executive Committee Conclusions No. 15, *supra* ("States should use their best endeavors to grant asylum to bona fide asylum-seekers").

[46] Article 34 of the 1951 Convention.

[47] The Executive Committee has stressed that the Convention and the Protocol should "be fully implemented according to both the letter and the spirit" in which they were conceived. Executive Committee Conclusions No. 1, *supra*.

situation of refugees has the potential to create foreign policy concerns. Rather than provide foreign policy exclusion grounds as a means for States to deal with the refugee problem, the Convention requires Parties to "do everything within their power to prevent this problem from becoming a cause of tension between States." [48] That is, the Convention not only provides for exclusively non-political criteria in defining "refugee," but it expressly reaffirms the social and humanitarian nature of those criteria by urging States to regard any grant of refugee status as a humanitarian, non-political act, thus attempting to ameliorate foreign policy concerns of countries of asylum.

The Statute of the Office of the UNHCR further supports the principle of the non-political nature of solutions to refugee problems. Pursuant to Chapter I, paragraph 2 of the Statute, the High Commissioner's function of providing international protection to refugees "shall be of an entirely non-political character."

The international refugee-related instruments that have followed the 1951 Convention and 1967 Protocol also have articulated a politically neutral system of refugee status determination and protection. In the Americas, the Cartagena Declaration on Refugees [49] exemplifies the way in which the non-political character of the provisions of the 1951 Convention and 1967 Protocol is being applied equally to asylum and refugee status determinations. The Declaration aimed, *inter alia*, to promote the application of the Convention and the Protocol. In doing so, it "confirm[ed] the peaceful, *non-political* and exclusively humanitarian *nature of* [*the*] *grant of asylum* or recog-

[48] Preamble to the 1951 Convention.

[49] Concluded on November 22, 1984. Portions of this Declaration have been incorporated into the refugee legislation of various governments in Latin America and are currently under consideration for inclusion in other municipal legislation, both in and outside Latin America.

nition of the status of refugee and . . . underline[d] the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees." [50]

In another region of the world, the Organization of African Unity (OAU) sought to reduce or eliminate refugee problems as a source of discord among States in Africa. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides that "[t]he grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State." [51]

As one well-known authority has maintained, "because the granting of asylum is not contrary to international friendship, the government of a refugee's country of origin cannot maintain that there exists or should exist such a solidarity between governments as would demand the surrender or expulsion of a refugee." [52]

In short, the refugee status determination system established by the Convention and the Protocol is non-political, and the developing international standards concerning asylum respect this non-political and humanitarian nature of the international protection of refugees.

B. The International System Established to Protect Refugees will be Substantially Undermined if Governments Deny Asylum Based on Foreign Policy Criteria.

If governments disregard the non-political character of refugee protection and deny asylum based on foreign

[50] Cartagena Declaration, Chapter III, ¶ 4, at 34 (English translation) (emphasis added).

[51] Article II of the OAU Convention, 1001 U.N.T.S. 45, 48, No. 14691. The OAU Convention was adopted on September 10, 1969, and entered into force on June 20, 1974.

[52] 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 27 (1972).

policy criteria, they will substantially undermine the international protection system.

It is precisely to eliminate the concern of governments as to the effect of refugee status and asylum determinations upon their relations with others that the Convention, the Protocol, and related international instruments established a non-political, humanitarian system of protection for refugees. The system works with the understanding of States that a recognition of refugee status or a grant of asylum is a humanitarian act, not a political one. Once a discrimination among refugees based on foreign policy concerns is sanctioned by a Party to the Convention or Protocol, that system breaks down.

In view of the politically neutral definition of "refugee" in domestic and international law and developing international standards regarding the institution of asylum, the Court of Appeals concluded:

> "By defining eligibility in politically-neutral terms, Congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum."

Petition App. 21a.

A politicization of the asylum process in the United States would undermine the ability of UNHCR to carry out the mandate conferred upon it by the international community to protect refugees and asylum-seekers. Such a result from this case would be all the more unfortunate because it is premature and unnecessary.

CONCLUSION

For the foregoing reasons, the Office of the United Nations High Commissioner for Refugees respectfully urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

JOSEPH PATRICK DOHERTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amicus curiae, the American Civil Liberties Union ("ACLU"), is a nationwide non-partisan organization of nearly 300,000 members dedicated to protecting civil rights and civil liberties. Since its founding, the ACLU has sought to ensure that the protection of the Constitution and laws apply equally to all persons, including immigrants and refugees. In particular, the ACLU, through its Immigrants' Rights Project, has engaged in litigation and advocacy to secure the rights of persons seeking political asylum in the United States, to implement the Refugee Act of 1980, to insure that asylum decisions are governed by neutral criteria unaffected by United States foreign policy, and to enforce the right to a meaningful hearing at which claims are presented and adjudicated.

Amicus curiae, the American Immigration Lawyers Association ("AILA"), is a national association of lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has a serious interest in the case now before this Court because the issues directly involve the practice of immigration law. AILA wants to ensure that any developments in immigration law facilitate the administration of justice and maintain the integrity of the basic structure of immigration law.[1]

SUMMARY OF ARGUMENT

At stake in this appeal is the fairness and adequacy of the procedures available to an alien seeking to reopen his or her deportation proceeding to apply for withholding of deportation or asylum. Joseph Doherty seeks only a "fair opportunity to develop and present" evidence in support of his claims. *INS v. Abudu*, 485 U.S. 94, 107 (1988). The INS contends that it may deny Doherty's claims without providing

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1 *Amici* have the consent of the parties to file this brief. Letters of consent have been filed separately with this Court.

him with a hearing and the opportunity to prove his eligibility for both withholding of deportation and asylum.

The Attorney General's erroneous interpretation of the requirements for a motion to reopen led to the denial of Doherty's claims. It is well settled, under both INS regulations and case law, that there are two threshold requirements that must be satisfied before a motion to reopen will be granted: (1) the movant must establish a *prima facie* case for the underlying relief sought, and (2) the movant must present "previously unavailable, material evidence," or a "reasonable explanation" for his or her failure to initially request asylum. *INS v. Abudu*, 485 U.S. at 104-05 (citations omitted). Doherty has satisfied both of these threshold requirements.

In challenging Doherty's compliance with the two threshold requirements, the INS argues that new evidence submitted in support of a motion to reopen must have been unforeseeable at the time of the initial deportation hearing. This foreseeability requirement is unprecedented, not based in regulation or case law, and will create an administrative nightmare for asylum practitioners and adjudicators alike. Aliens will be compelled to submit requests for asylum based on the possibility that conditions may arise that might lead them to fear persecution. A foreseeability requirement will needlessly burden the asylum system.

In *Abudu* this Court stated a third ground for denying a motion to reopen explicitly limited to "cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, *but not withholding of deportation*). . . ." *Abudu*, 485 U.S. at 105 (emphasis added). When reopening is sought for a discretionary claim, the Attorney General may determine that the movant would not ultimately be entitled to a discretionary grant of the relief sought. This third basis for denying a motion to reopen under *Abudu* is inapplicable to an application for non-discretionary withholding of deportation. Since Doherty satisfied the two threshold requirements governing a motion to reopen, he must be granted a hearing to determine his eligibility for withholding under section 243(h).

Withholding of deportation is accorded a special place in our immigration laws because it fulfills the United States' obligations under international covenants which ensure that a refugee is not returned to a country where he or she faces persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987); *INS v. Stevic*, 467 U.S. 407, 416-17 (1984). Moreover, a hearing is all the more essential because of the complex factual issues that must be explored in determining eligibility for withholding, such as the extent of persecution faced by an alien, the alien's motives, the severity of any alleged crimes committed and the context of his or her activities, and any mitigating or aggravating circumstances.

Because withholding of deportation is such a fundamental protection, this brief focuses on INS' obligation to afford Doherty a hearing on his withholding claim. Doherty, however, is also entitled to a hearing on his asylum claim. While a motion to reopen for asylum may be denied by concluding that the movant would not ultimately be granted asylum, the INS does not have unfettered discretion to deny asylum. A denial of asylum based on foreign policy considerations contravenes the purpose of the Refugee Act of 1980. Because the elimination of foreign policy considerations from asylum determinations under international law and by the intent of Congress is fully discussed in other *amici* briefs, we will not repeat those arguments here. *See* Brief of *Amicus Curiae* United Nations High Commissioner for Refugees [hereinafter UNHCR] and Brief of *Amici* Members of Congress. We will demonstrate, however, that the INS itself recognizes the inappropriate nature of foreign policy concerns through the promulgation of the 1990 INS asylum regulations and its commitment to the recent settlement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991) [hereinafter *ABC* Settlement].

ARGUMENT

I. DOHERTY SATISFIES THE THRESHOLD REQUIREMENTS UNDER *INS V. ABUDU* GOVERNING MOTIONS TO REOPEN TO APPLY FOR WITHHOLDING OF DEPORTATION.

The most fundamental safeguard available to an alien who fears persecution is withholding of deportation under section 243(h) of the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101, 1253(h) (Supp. 1990)) (PA at 165a)[2] [hereinafter INA]. Section 243(h) provides that the "Attorney General *shall* not deport or return *any alien* . . . to a country" if the alien demonstrates a clear probability of persecution in that country. *Id.* (emphasis added); *INS v. Stevic*, 467 U.S. at 421-22. Unlike asylum, which contains an element of discretion, withholding of deportation is mandatory if the alien satisfies the statutory criteria. *INS v. Stevic*, 467 U.S. at 421 n.15. Withholding of deportation may be sought when an alien is initially subjected to deportation proceedings or, if requested subsequent to the time for initial submission, pursuant to a motion to reopen under the governing regulations. *See* 8 C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a).

In *INS v. Abudu* this Court emphasized that there are two "threshold" requirements for a motion to reopen: (1) the movant must establish "a *prima facie* case for the underlying substantive relief sought," and (2) the movant must present "previously unavailable, material evidence, 8 C.F.R. § 3.2," or, the movant must "reasonably explain his failure to apply for asylum initially, 8 C.F.R. § 208.11." *Abudu*, 485 U.S. at

2 Citations to the appendix that accompanied the Petition for Writ of Certiorari are made to the page number therein as "(PA at _____)." Citations to the joint appendix that accompanies the Petitioner's Brief are made to the page number therein as "(JA at _____)."

104-06. Doherty has met both of these threshold requirements.[3]

The first requirement, that the applicant establish a *prima facie* case, is based on long-standing Board of Immigration Appeals' [hereinafter BIA] precedent. *See INS v. Jong Ha Wang*, 450 U.S. 139, 141 (1981) (citing *Matter of Lam*, 14 I. & N. Dec. 98 (BIA 1972); *Matter of Sipus*, 14 I. & N. Dec. 229 (BIA 1972)). The second requirement, that the applicant present "previously unavailable, material evidence" or "reasonably explain" the failure to apply initially, is drawn from the language of sections 3.2 and 208.11 of the regulations. See 8 C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a).[4]

A. Doherty Established a *Prima Facie* Case for Both Asylum and Withholding of Deportation.

The INS does not dispute that Doherty satisfies the "*prima facie* case" requirement for reopening. The Attorney General's decision expressly assumes that, if returned to the United Kingdom, Doherty's " 'life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion. . .' " under the standard governing eligibility for withholding of deportation. *In re Doherty*, Att'y Gen. Dec. at 28 (June 30, 1989) (PA at 83a) [hereinafter Att'y Gen. Dec.]. In reversing the BIA's grant of Doherty's motion to reopen, the Attorney General explicitly stated that "[i]t is unnecessary for me to address (and I do not) the question of whether [Doherty] has established a *prima facie* case

3 *Abudu* also recognized a third ground for denying a motion to reopen where the underlying relief being sought is *discretionary*. *Abudu*, 485 U.S. at 105-07. As discussed in Part II, *infra*, this Court specifically noted that this third basis for denial does not apply when the applicant is seeking the *non-discretionary* relief of withholding of deportation. *Id.* at 105.

4 In *Abudu* this Court held that a motion to reopen a claim for withholding of deportation must meet the requirements of either sections 3.2 or 208.11. *See Abudu*, 485 U.S. at 99 n.3. ("the BIA's application of [section 208.11], which on its face applies only to asylum requests on reopening, will also usually be dispositive of its decision whether to reopen to permit a withholding of deportation request.").

for the *substantive relief sought.*" *Id.* at 15 n.21 (emphasis added) (PA at 64a). Thus, Doherty is presumed to have met his burden of demonstrating *prima facie* eligibility for withholding of deportation (as well as for asylum).[5] *Doherty v. INS*, 908 F.2d 1108, 1115 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 950 (1991); *see also Jen Hung Ng v. INS*, 804 F.2d 534, 538 (9th Cir. 1986); *Mattis v. INS*, 774 F.2d 965, 967 (9th Cir. 1985).

B. Doherty Presented "Previously Unavailable, Material Evidence" and a "Reasonable Explanation" in Support of His Motion to Reopen.

The second threshold requirement for reopening is the presentation of "previously unavailable, material evidence," or a "reasonable explanation" for the alien's failure initially to apply for the relief sought. *Abudu*, 485 U.S. at 104-05 (citing 8 C.F.R. §§ 3.2 and 208.11 (1987)).[6] Doherty satisfied this

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5 The INS' argument that the evidence offered by Doherty in support of his motion to reopen was held by the BIA to establish only a *prima facie* case for *asylum* and that no finding was made whether that evidence established a *prima facie* case under the higher standard for mandatory *withholding of deportation* (Brief for the Petitioner at 6-7 n.5, 35 n.20) [hereinafter Pet. Br.], is contradicted by the BIA's decision below. The BIA explicitly reopened Doherty's case to apply for *both* "asylum and withholding of deportation." *Matter of Doherty*, BIA File No. A261852, at 6-7 (BIA Nov. 14, 1988) (PA at 99a-100a) [hereinafter BIA Dec.].

Because the question of whether Doherty established a *prima facie* case is not before this Court, there is also no reason to address the possible adoption of a "unitary abuse-of-discretion standard of review." Pet. Br. at 38-39. In any event, a unitary standard is inappropriate because the first prong of *Abudu*, whether an alien has presented sufficient evidence to make a *prima facie* case, must be judged under a "substantial evidence" standard since it involves a review of factual findings. *See Ipina v. INS*, 868 F.2d 511, 513 (1st Cir. 1989) (factual findings determining withholding of deportation governed by substantial evidence standard of review); *Pierre v. Rivkind*, 825 F.2d 1501, 1505 (11th Cir. 1987) (same); *Caravajal-Munoz v. INS*, 743 F.2d 562, 567 (7th Cir. 1984) (same).

6 Section 3.2 of the regulations requires that the new evidence offered to support reopening must be "material" and "could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2 (1987) (PA at 165a-66a). It further provides that relief must be "sought on the basis of circumstances which have arisen subsequent to the hearing." *Id.* In addition, section 208.11 requires that the movant must "reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding." 8 C.F.R. § 208.11 (1987) (PA at 166a). Both sections govern reopening for withholding of deportation. *See supra* note 3.

burden of presenting previously unavailable evidence on two independent grounds. First, the Extradition Act of 1987[7] between the United Kingdom and Ireland became effective on December 1, 1987, fifteen months after the withdrawal of Doherty's initial application for withholding and asylum and the Immigration Judge's order that Doherty be deported to Ireland. Implementation of the Extradition Act of 1987 was a material change because it amended Irish extradition law in a manner that would guarantee Doherty's extradition to the United Kingdom if he were deported to Ireland. Second, Attorney General Meese rejected Doherty's designation and the Immigration Judge's order that he be deported to Ireland under INA section 243(a). INA § 243(a), 8 U.S.C. § 1253(a). This unprecedented refusal by the Attorney General materially affected Doherty's fear of being returned to persecution in the United Kingdom.[8] Both of these material changes also constitute a reasonable explanation for Doherty's failure to pursue his initial claim.

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7 Extradition (European Convention on the Suppression of Terrorism) Act, No. 1 (1987) (JA at 96-108) [hereinafter Extradition Act of 1987]. The Extradition Act of 1987 applies to offenses where the warrant is issued after December 1, 1987. *Carron v. McMahon*, [1990] I.L.R.M. 802, 805-06.

8 In their brief on the merits, the INS chooses not to address the findings of both the BIA and Court of Appeals that Attorney General Meese's unprecedented decision to prevent Doherty from being immediately deported to Ireland satisfied the threshold requirement for "previously unavailable, material evidence" and a "reasonable explanation." Pet. Br. at 46; *But see Doherty v. INS*, 908 F.2d at 1115-16; BIA Dec. at 6-7 (PA at 99a).

1. Implementation of the Irish Extradition Act of 1987 on December 1, 1987 Constitutes New Evidence and a Reasonable Explanation Warranting Reopening.

a. The Extradition Act of 1987 Meets the Regulation's Requirements for Reopening.

New evidence of the implementation of the Extradition Act of 1987 on December 1, 1987 unquestionably satisfies the requirement that the movant present previously unavailable material evidence or a reasonable explanation for failure to apply initially.

When Doherty was first arrested in June 1983, he immediately applied for withholding of deportation and asylum. His requests were stayed for the next three years while the United Kingdom unsuccessfully sought his extradition, and the United States appealed. In September 1986, when Doherty's deportation proceedings resumed, he designated Ireland as his country of deportation pursuant to INA section 243(a), and only then withdrew his requests for withholding and asylum. The Immigration Judge ordered Doherty immediately deportable to Ireland, but the INS appealed the decision on the ground that his return would be "prejudici[al] to the interests of the United States." INA § 243(a), 8 U.S.C. § 1253(a); *see Doherty v. INS*, 908 F.2d at 1111 (PA at 4a). During the pendency of the INS' appeals, the Extradition Act of 1987 went into effect. As a result, deportation to Ireland became the functional equivalent of deportation to the United Kingdom. Accordingly, two days after the Irish Extradition Act of 1987 came into force, Doherty filed his motion to reopen to seek withholding of deportation and asylum.

Since the Extradition Act of 1987 did not go into effect until over a year after the Immigration Judge ordered Doherty deported to Ireland, the requirement of section 3.2 that the evidence "could not have been presented at the former hearing" is clearly met. 8 C.F.R. § 3.2 (1987). Likewise, implementation of the Extradition Act of 1987 satisfies the requirement of section 3.2 that Doherty's claims for asylum and withholding must be sought "on the basis of circumstances which have arisen subsequent to the hearing." *Id.* The entering into force of the Extradition Act of 1987 also constitutes "material" evidence because it would result in Doherty's *de facto* deportation to the United Kingdom. *Id.* At the time Doherty was ordered deported to Ireland, he did not fear being returned to the United Kingdom under Irish extradition law. As shown in part 1.b., *infra*, after the implementation of the Extradition Act of 1987, his return was a virtual certainty. Evidence demonstrating that an applicant will be delivered directly to the country where he fears persecution is manifestly material.[9]

The INS argues that the enactment of the Extradition Act of 1987 cannot support Doherty's motion to reopen because any change in *Irish* law is unrelated to the merits of Doherty's underlying claims for asylum and withholding of deportation from the *United Kingdom*. Pet. Br. at 48. The INS ignores that this change in Irish law subjected Doherty to immediate extradition to the United Kingdom if he were returned to Ireland. Thus the change in law resulted in a new and direct threat that Doherty would be subject to the persecution he feared in the United Kingdom.

The INS' argument is also based on a reading contrary to the language of the regulations. Section 3.2 does not limit "material" evidence to that which relates solely to circumstances in the country where a movant fears the persecution will occur. Such a limitation would be contrary to the plain meaning of the regulations' requirements that a movant present evidence of changed "circumstances," or a "reasonable explanation." *See* 8 C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a). These requirements necessarily include factors that increase the likelihood of persecution feared by the movant,

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9 Implementation of the 1987 Act also satisfies section 208.11's requirement that Doherty offer a "reasonable explanation" for his decision not to pursue his initial application. 8 C.F.R. § 208.11 (PA at 165a-66a). When Doherty withdrew his claims in September 1986, he believed (as did the Immigration Judge and the BIA) that he would be deported to Ireland and Doherty did not fear his return to the United Kingdom prior to implementation of the 1987 Act on December 1, 1987.

including changes that will result in him or her being returned to the persecuting country.

The INS' narrow reading is especially inapplicable to the circumstances of this case. The traditional reasons discussed by this Court in *Abudu* as to why motions to reopen are disfavored simply do not apply to Doherty's motion. *See Abudu*, 485 U.S. at 107 ("the reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence." (footnote omitted)). Unlike the case of an asylum applicant who failed to prove his claim after a hearing and thereafter offers new evidence, Doherty has never received a hearing in the first instance. Thus, Doherty's motion to reopen is not analogous to a petition for rehearing or to a motion for a new trial on the basis of newly discovered evidence.

In *Abudu*, this court emphasized that the "strong public interest in bringing litigation to a close" must be balanced and "consistent with giving the adversaries a fair opportunity to develop and present their respective cases." *Abudu*, 485 U.S. at 107. The INS' attempt to narrowly limit the new evidence Doherty can introduce to support reopening is contrary to what this Court acknowledged in *Abudu* to be the public interest in providing a "fair opportunity" for aliens to present their cases in the first instance.

b. The Extradition Act of 1987 Changed Irish Law and Made Doherty's Extradition to the United Kingdom from Ireland a Certainty.

The Extradition Act of 1987 changed Irish extradition law and rendered Doherty's extradition from Ireland to the United Kingdom a virtual certainty. The Attorney General abused his discretion by holding that "the 1987 Extradition Act did not constitute a material change in the law of extradition in Ireland." Pet. Br. at 47.

In September 1986, when Doherty designated Ireland as his country of deportation, extradition from Ireland to the United Kingdom was subject to the 1965 Extradition Act in

the Republic of Ireland. Extradition Act of 1965, No. 17 (1965) [hereinafter 1965 Extradition Act]. The 1965 Extradition Act provided a clear exception from extradition where the offense for which extradition was sought was a "political offence or an offence connected with a political offence." 1965 Extradition Act § 50(2)(a)(i).[10]

In contrast, the Extradition Act of 1987, which went into effect on December 1, 1987, drastically limits the "political offence" exception contained in the 1965 Extradition Act. Section 3 of the Extradition Act of 1987 lists offenses that can *never* be political offenses, withdrawing them from the exception's scope. It specifically prohibits offenses involving the use of "an explosive, or automatic firearm" from classification as political. Extradition Act of 1987 (JA at 97-99). The text of the Extradition Act of 1987 plainly creates a material change in Irish extradition law and the new limitation directly affects Doherty's ability to resist extradition from Ireland to the United Kingdom.[11] As a result of this material change in Irish Extradition Law, Doherty's return to Ireland became the functional equivalent of extradition to the United Kingdom.

2. Attorney General Meese's Refusal to Accept Doherty's Designation of Deportation to Ireland Also Constitutes New Evidence and a Reasonable Explanation Warranting Reopening.

Attorney General Meese's unprecedented decision to reject Doherty's designation of deportation to Ireland constitutes independent "material evidence" and an additional "reasonable explanation" for Doherty's motion to reopen. *See* 8

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10 The 1965 Extradition Act left the meaning of the term "political offence" for courts to decide. *See* 1965 Extradition Act § 50. Notably, this language parallels the language in the extradition treaty between the United States and the United Kingdom pursuant to which Judge Sprizzo held that Doherty could *not* be extradited since he had committed "political offenses" in the United Kingdom. *Matter of Doherty*, 599 F. Supp. 270, 275-76 (S.D.N.Y. 1984).

11 *See also* Extradition Act of 1987 (JA at 96) (preamble defines Act's purpose as to "amend and extend the Extradition Act, 1965").

C.F.R. §§ 3.2, 208.11 (1987) (PA at 165a-66a). Prior to Doherty's case, an alien's designation of a country that would accept him or her and an Immigration Judge's order enforcing the deportation had *never* been rejected by an Attorney General on the basis of "prejudice to the interests of the United States." INA § 243(a), 8 U.S.C. § 1253(a); *see Doherty v. INS*, 908 F.2d at 1116 (PA at 14a). Accordingly, both the BIA and the Court of Appeals recognized that "Doherty had a 'reasonable expectation' of being returned to the Republic of Ireland" at the time of his deportation hearing. *Doherty v. INS*, 908 F.2d at 1116 (quoting BIA Decision) (PA at 14a). Nonetheless, the INS contends that these unique and extraordinary circumstances do not entitle Doherty to reopen his proceedings. The INS' position is contrary to logic and leads to unworkable and counterproductive results.

Whenever an alien fears persecution, his overriding concern is to avoid being returned to the country where he faces that threat. Under these circumstances, an alien may well designate a third country for deportation pursuant to INA section 243(a), rather than endure the delays and risks of pursuing a withholding and asylum claim that could result in denial and a return to persecution.[12] If the Attorney General rejects the designation of a country that will accept the alien, that alien must have the opportunity to pursue his or her withholding and asylum claims. Otherwise, every alien who fears persecution and who designates an alternative "safe" country for deportation, will nonetheless be compelled to pursue a withholding (and asylum) application to guard against the possibility that the Attorney General will reject his or her designation of a safe country. Alternatively, aliens will forego designating a country altogether for fear that the Attorney General's intervention might foreclose their ability to initiate or reopen a claim for withholding of deportation or asylum. Instead of encouraging aliens to choose to accept immediate deportation to a designated country and thereby relieving the

12 *See, e.g.*, Note, *INS v. Cardoza-Fonseca: Establishment of a More Liberal Asylum Standard*, 37 Am. U.L. Rev. 915, 945 (1988) (noting backlogs of up to two and one half years on asylum claims).

Immigration Service of the substantial administrative burden of processing needless applications (including subsequent appeals), the system will be burdened with countless unnecessary claims.

C. There is No Basis for Requiring that New Evidence Supporting Reopening Must Be "Unforeseeable."

1. A Foreseeability Requirement Would Lead to Absurd Results in the Asylum Process.

The INS' assertion that changed circumstances must be "unforeseeable" in order to support a motion to reopen is contrary to law and leads to absurd results. The INS argues that the Extradition Act of 1987 could not support reopening because its implementation was "foreseeable." Pet. Br. at 48; Att'y Gen. Dec. at 17-21 (PA at 67a-73a). However, as the Court of Appeals and the BIA below emphasized, "[n]either the regulations nor the applicable decisional law require expressly or by implication that the new evidence be 'unforeseeable'; indeed, such a rule would lead to absurd consequences." *Doherty v. INS*, 908 F.2d at 1115 (PA at 13a); *see also* BIA Dec. at 6 (PA at 99a) ("If the respondent were expected to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum [from] any country to which he might be remotely deported, if he had a fear of returning there.").

Requiring aliens to assert claims for asylum or withholding of deportation based on both the facts and law as they exist at the time of their hearing, and any foreseeable changes that may occur in the future, will create an infinite number of issues relevant at any hearing. Political instability is endemic to many countries from which aliens seek asylum; under the INS' scenario, an applicant will be burdened with the impossible task of predicting whether any possible future changes in a country's politics may result in a fear of persecution. Withholding and asylum hearings will bog down with disputes over whether events are foreseeable and will be marked by speculative political predictions more suitable for televi-

sion political talk shows. For example, an Ethiopian national who feared persecution by the Tigrean rebels who recently seized control of the Ethiopian capital of Addis Ababa, would be expected to have made a determination as to whether that shift in power was foreseeable.

Aliens will also be compelled to submit requests for asylum on the speculative possibility that conditions might change and lead them to fear persecution. An Afghan national who fears persecution by one of the factions of the rebel resistance will be expected to predict which of seven rival Mujahedin rebel groups (if any) will overthrow the current Najibullah government. Precious resources will be expended adjudicating peripheral and speculative issues based on applications filed out of precaution rather than a fear of persecution.[13]

2. Even if Foreseeability Were Relevant, Implementation of the Extradition Act of 1987 Was Not Foreseeable.

Even if unforeseeability were engrafted onto the requirements for a motion to reopen, the change in law caused by the Extradition Act of 1987 was not foreseeable when Doherty designated deportation to Ireland in September 1986.

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13 Requiring movants to file as soon as a change in circumstances is "foreseeable" would also be inconsistent with the requirement that a movant must establish *prima facie* eligibility for relief in support of a motion to reopen. If events are "foreseeable" but have not yet occurred, the facts necessary for a *prima facie* case are unlikely to be present. For example, a change in government might be "foreseeable," but a *prima facie* case for withholding or asylum based on fear of that anticipated government could not be established until the allegedly "foreseeable" events actually occur. The requirements for a motion to reopen that apply to suspension of deportation (which requires seven years continuous residence in the United States, INA § 244(a), 8 U.S.C. § 1254(a)) or to adjustment of status (which may be predicated on marriage to a citizen, INA § 245(e), 8 U.S.C. § 1255(e)) would be similarly confused. While seven years residence or marriage to a citizen might be "foreseeable" prior to their occurrence, a *prima facie* case will not be established until the anticipated events transpire. *INS v. Rios-Pineda*, 471 U.S. 444 (1985) (seven year continuous residency requirement to establish *prima facie* case). In short, the INS effort to require both a *prima facie* case and an "unforeseeability" standard would create a virtually insurmountable barrier to motions to reopen.

The INS makes much of the fact that the European Convention on the Suppression of Terrorism [hereinafter European Convention] was signed by Ireland in February 1986—before Doherty designated Ireland. Pet. Br. at 48; Att'y Gen. Dec. at 17 (PA 67a-68a). However, the European Convention had no impact on Irish law until domestic legislation was enacted by the Irish Parliament. Such enactment remained subject to numerous uncertainties and contingencies until the day the Extradition Act actually went into effect in December 1987. These uncertainties included doubts about the survival of the major Anglo-Irish cooperation agreement that had caused Ireland to sign the European Convention in the first place, continuing domestic turmoil in both countries that threatened to dismantle the cooperation agreement, and serious legal and political concerns regarding domestic implementation of the European Convention.

Ireland signed the European Convention pursuant to the Anglo-Irish Agreement with Britain,[14] *see Complete Text of Anglo-Irish Communique on Ulster* para. 7, The Times (London), Nov. 16, 1985, at 4, col. 3 [hereinafter Anglo-Irish Communique]; Att'y Gen. Dec. at 17 (PA at 67a-68a), and its signing was a major and controversial concession[15] by the Irish government in response to concessions by the British government. *See A Way Forward for Ireland*, Manchester Guardian Weekly, Nov. 24, 1985, at 1. As a result, withdrawal or invalidation of the Anglo-Irish Agreement would have led to Ireland's withdrawal from the European Convention. *See* Anglo-Irish Communique, *supra*, para. 7 (promise by Irish government to accede to the European Convention given upon the express condition that progress is reached by an intergovernmental committee on matters of justice and security in Northern Ireland).

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14 Anglo-Irish Agreement, Nov. 15, 1985, Ireland-United Kingdom, 24 I.L.M. 1597.

15 The Irish Government had previously resisted signing the European Convention precisely because it was unwilling to abrogate the "political offence" exception to extradition and because it believed it unconstitutional to do so. *See* Connelly, *Non-Extradition for Political Offences: A Matter of Legal Obligation Or Simply A Policy Choice*, 1982 Irish Jurist 59.

The Anglo-Irish Agreement established a framework for addressing political, legal and security matters in Northern Ireland, including the administration of justice and the promotion of cross-border cooperation. From the time it was entered into in November 1985, the Anglo-Irish Agreement's continued existence was in constant doubt because it was attacked on many fronts in both the United Kingdom and Ireland. In Northern Ireland there was a concerted effort by Unionists and Loyalists, through rioting and protests, to dismantle the Anglo-Irish Agreement. *See Unionists Threaten To Make Ulster "Ungovernable"*, Manchester Guardian Weekly, Dec. 1, 1985, at 3. These efforts stood a strong chance of succeeding in that similar protests had successfully dismantled a comparable agreement in 1974. *Id.*

In addition, the legality of the Anglo-Irish Agreement was challenged in the courts of Northern Ireland, *see* Hadfield, *The Anglo-Irish Agreement—Blue Print or Green Print?*, 37 N. Ireland Legal Q. 1, 21-26 (1986), and was the subject of serious dispute in the Republic of Ireland. *See McGimpsey v. Ireland*, [1990] I.L.R.M. 441. Equally significant, the leader of the political opposition in Ireland, who was expected to gain office during the life of the Anglo-Irish Agreement, strongly opposed the Agreement and threatened to renegotiate it. *See* Kennedy, *How the South Was Won*, 257 Fortnight 13 (Dec. 1987). If any of these events had occurred and the Anglo-Irish Agreement had dissolved, Ireland's withdrawal from the Convention would undoubtedly have followed and the Extradition Act of 1987 would never have been introduced, much less come into force.

Indeed, despite the survival of the Anglo-Irish Agreement, Irish enactment of domestic legislation to implement the European Convention remained in doubt. Enactment of implementing legislation was contingent on changes in the legal system of Northern Ireland, *see* Anglo-Irish Communique, *supra* p. 15, para. 7, and the Irish government remained reluctant to introduce such legislation until these reforms were realized. *See* Kennedy, *supra*, at 13. Moreover, even when the Extradition Act of 1987 was enacted in January 1987, whether and when it would come into force as domestic

law remained uncertain because the effective date of the Act was subject to numerous contingencies.[16] Until December 1987, the majority party in Ireland opposed allowing the Extradition Act of 1987 to come into force. *Id.* It was not until December 1, 1987 that implementation of the act as law became certain. The complexity of events effecting implementation of the Convention through the Extradition Act of 1987 reveals that such implementation was uncertain and unforseeable in September 1986.

II. ASSUMING THE THRESHOLD REQUIREMENTS OF *ABUDU* ARE MET, DOHERTY IS ENTITLED TO A HEARING TO DETERMINE HIS ELIGIBILITY FOR WITHHOLDING OF DEPORTATION UNDER SECTION 243(h).

A. Under *Abudu*, the Attorney General Does Not Have the Power to "Leap Ahead" and Deny Doherty's Motion to Reopen on the Ground that He is Disqualified from Withholding of Deportation.

Once Doherty has met the threshold requirements governing a motion to reopen, he must be granted a hearing to determine his eligibility for withholding of deportation under section 243(h). The relief provided by section 243(h) is critically important because it establishes the most basic safeguards against returning aliens to countries where they are likely to be persecuted, and satisfies the United States' obligations under international covenants governing the treatment of refugees. *See INS v. Cardoza-Fonseca*, 480 U.S. at 430;

16 Section 13(2) of the Extradition Act of 1987 specified a flexible commencement date because "ratification . . . was set against the background of progress in relation to three matters under the [Anglo-Irish] Agreement: public confidence in the administration of justice in Northern Ireland, relations between the security forces and the minority community in Northern Ireland, and security cooperation between the British and the Irish Governments." Connelly, Extradition (European Convention on the Suppression of Terrorism) Act, 1987, *General Note*, 1-2 (citing 370 Dáil Debates Cols. 1379-83).

INS v. Stevic, 467 U.S. at 416-18.[17] Specifically, withholding of deportation fulfills the "non-refoulement" (no return) requirements of Article 33 of the Convention, which imposes a "mandatory duty on contracting states not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons." *INS v. Cardoza-Fonseca*, 480 U.S. at 429.[18] Upon a showing of a "clear probability" of persecution, *INS v. Stevic*, 467 U.S. at 430, withholding of deportation is mandated to protect the alien from persecution. Unlike the "broader benefits" afforded by asylum, such as permanent residence status, *INS v. Cardoza-Fonseca*, 480 U.S. at 428 n.6, withholding does not preclude deportation to non-hostile third countries, but does provide the crucial protection of temporary refuge. *Id.*

Recognizing the exceptional importance of the protections conferred by withholding of deportation, this Court in *Abudu* expressly limited the INS' authority to "leap ahead," and deny reopening to "cases in which the ultimate grant of relief is discretionary . . . ." *Abudu*, 485 U.S. at 105. Cases involving the "mandatory" relief of withholding of deportation under section 243(h) were explicitly excluded from those that can be summarily disposed of on the merits in the context of a motion to reopen. *Id.* In direct conflict with *Abudu*, the Attorney General chose to "leap ahead" and deny

17 In 1968 the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter Protocol]. The Protocol bound parties to comply with the substantive provisions of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter Convention]. The INS acknowledges in its brief to this Court that it is legally bound to apply the substantive provisions of the Convention, as a result of our country's accession to the Protocol. Pet. Br. at 24.

18 Article 33.1 of the Convention provides:

> "No Contracting State shall expel or return ['refouler'] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Convention, *supra* note 17, at 176, *reprinted in* Protocol, *supra* n.17, at 6278.

Doherty's motion to reopen on the ground that he is ineligible for withholding of deportation under two disqualification clauses that limit the reach of section 243(h). *See* 8 U.S.C. § 1253(h)(2)(A), (C) (PA at 165a).

B. An Individualized Factual Record Must Be Developed to Determine Whether Doherty is Disqualified from Withholding Under Section 243(h).

A full hearing that leads to the creation of an individualized, factual record is indispensable to determining whether Doherty falls within the limited exceptions for denying withholding of deportation under section 243(h). In finding Doherty disqualified for withholding of deportation, the Attorney General does not contest Doherty's claim that he would suffer persecution if returned to the United Kingdom. Instead he relies on two disqualification clauses that deny section 243(h) relief to otherwise eligible aliens who have engaged in persecution or committed non-political crimes.[19]

19 These clauses provide that the protection afforded by section 243(h)(1):

> shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion [or] . . .
>
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime . . ."

8 U.S.C. § 1253(h)(2)(A),(C) (PA at 165a).

The Convention contains similar disqualification clauses, but they are not worded in exactly the same way. Article 1.F of the Convention states that its provisions,

> shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Convention, art. 1.F., *supra* note 17, at 156.

These disqualification provisions must be interpreted consistently with the requirements of the Convention.[20] While the Attorney General's decision cites both provisions (Att'y Gen. Dec. at 29-35 (PA 83a-91a)), a finding of disqualification under either ground depends upon the Attorney General's description of the IRA, upon his imposition of vicarious liability on Doherty for the alleged acts of the IRA, and upon his characterization of Doherty's conduct as non-political. Necessarily, such conclusions require a hearing at which all relevant evidence is presented and considered.

For example, the determination of whether "there are serious reasons for considering" that a person "has committed a serious non-political crime" (INA § 243(h)(2)(C)), which permeates the Attorney General's analysis (Att'y Gen. Dec. at 29-35 (PA 83a-91a)), requires a detailed factual hearing. *See* UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) [hereinafter *Handbook*].[21] A careful balancing of motive and means is required to determine whether an offense is non-political.[22] A further balanc-

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20 Congress' intention that section 243(h) be interpreted in a manner consistent with the Convention is abundantly clear. The Conference report accompanying section 243(h) states that it is "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. Code Cong. & Admin. News 160, 161; *see also* Brief of Amici Members of Congress. In implementing section 243(h), the INS is therefore bound to accord Doherty at least that amount of protection from deportation as is contemplated by the Protocol and, through it, the substantive provisions of the Convention. *INS v. Stevic*, 467 U.S. at 416.

21 This Court has recognized that the *Handbook* provides "significant guidance" in interpreting the obligations under section 243(h) and the Convention. *INS v. Cardoza-Fonseca*, 480 U.S. at 439 n.22.

22 The *Handbook* advises that:

> regard should be given, in the first place to [a political offense's] nature and purpose, *i.e.*, whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offense should also outweigh its common law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offense is also more difficult to accept if it involves acts of an atrocious nature.

Handbook, *supra* p. 20, at ¶ 152.

ing is required to assess the nature of the crime and the degree of persecution feared before deciding whether adequate grounds exist for disqualifying an individual from withholding of deportation. *Handbook*, *supra* p. 20, at ¶ 156. Finally, consideration of any mitigating or aggravating circumstances is required. *Id.* at ¶ 157. Only then can the merits of the applicant's entitlement to withholding be properly determined. None of these required factors can be assessed without a fully developed factual record.

The need for a hearing to determine whether Doherty has committed "non-political crimes" is dramatically underscored by the conclusions reached by Judge Sprizzo at Doherty's extradition hearing after considering virtually identical factors. In determining whether any violent act attributed to Doherty fell within the political offense exception, Judge Sprizzo considered "the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place." *Matter of Doherty*, 599 F. Supp. at 275. In the one circumstance where Doherty was permitted to present his case, the district court reached conclusions directly contrary to those the Attorney General used to deny Doherty a hearing.

The Attorney General principally relied on *portions* of the paper record of Doherty's extradition hearing to support his finding that no hearing is required to disqualify Doherty from withholding of deportation for having committed "non-political crimes." Att'y Gen. Dec. at 29-35 (PA at 83a-91a). Judge Sprizzo reached the opposite conclusion after reviewing the *entire* evidence live and observing the credibility and demeanor of *all* the witnesses, including a full day of testi-

mony by Doherty. Rejecting any suggestion that Doherty's activities were non-political or that "violence was directed against civilian[s]," Judge Sprizzo held that the facts of Doherty's case "present the assertion of the political offense exception in its most classic form." *Matter of Doherty*, 599 F. Supp. at 275-76.[23]

Moreover, Judge Sprizzo specifically rejected some of the very arguments that the Attorney General now relies on to declare Doherty's activities as non-political. For example, the Attorney General held that "record evidence that [Doherty] . . . took over a family-occupied house in a civilian, residential neighborhood . . ." supported his finding that Doherty's activities were directed at civilians, and therefore non-political. Att'y Gen. Dec. at 33 (PA at 88a). However, after considering all testimony and observing Doherty's live testimony on this subject,[24] Judge Sprizzo bluntly rejected the government's same argument as a basis for finding Doherty's actions as non-political. Indeed, Judge Sprizzo emphasized that Doherty's actions were never "directed against civilian[s]," stating that "[w]e are not faced here with a situation in which a bomb was detonated in a department store, public tavern, or a resort hotel, causing indiscriminate personal

23 In assessing whether Doherty's acts were political, Judge Sprizzo also determined that Doherty's conduct was not "violative of international law, [nor] inconsistent with international standards of civilized conduct." *Matter of Doherty*, 599 F. Supp. at 274. Because the Convention is one of the most important international covenants defining international standards for what constitutes protected political conduct, Judge Sprizzo's holding implicitly suggests that he would not have disqualified Doherty from withholding of deportation under section 243(h).

24 Doherty consistently testified that civilians are "not the targets of the Irish Republican Army . . . the Irish Republican Army has a policy and general regulation not [to] go for civilian targets in the war zone." Transcript of Hearing (April 2, 1984) in *In re Requested Extradition of Doherty by the Government of the United Kingdom* (JA at 142-43). In addition, he testified that when he and fellow IRA members came to the house at 371 Antrim Road, they "guaranteed the lady . . . that she was not the purpose of the operation, that [Doherty and others] needed to get to the second and third floor." *Id.* (JA at 118). Doherty further testified that an unarmed IRA member watched over the family to make sure that they "didn't wander onto the street or up the stairs." *Id.* (JA at 175).

injury, death and property damage." *Matter of Doherty*, 599 F. Supp. at 275.[25] Judge Sprizzo's decision demonstrates that the Attorney General's simplistic reliance on excerpts from a paper record does not justify a determination of disqualification for withholding of deportation under section 243(h).

A hearing is particularly essential where, as here, the Attorney General infers Doherty's exclusion largely on the basis of his membership in the IRA, which is alleged to have committed disqualifying acts, rather than on acts the applicant committed personally.[26] Even if the Attorney General's unsupported proposition that conspiracy law is relevant to a withholding claim were accepted, a hearing is nonetheless required. *See United States v. Peterson*, 524 F.2d 167, 174 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976) (conspiracy involves preconcert and connivance, not just aiding and abetting the commission of a crime).[27]

25 The Government, in its post-trial brief in the extradition proceeding, unsuccessfully argued that Doherty and three other IRA members "had forcibly taken over a building and held its inhabitants hostage." Post-Trial Memorandum of the Government at 34.

26 The Attorney General's reliance on *McMullen v. INS*, 788 F.2d 591, 593 (9th Cir. 1986), for this purpose is the equivalent of erroneously giving collateral estoppel effect to an action to which Doherty was not a party and in which his interests were not represented. *See Montana v. United States*, 440 U.S. 117, 153-55 (1979) (collateral estoppel only applies to parties who have had a full and fair opportunity to litigate). McMullen was an IRA defector seeking asylum from possible persecution by the IRA, not the British Security forces or Loyalist/Unionist paramilitaries. Consequently, McMullen was seeking withholding of deportation from Ireland, not the United Kingdom. *McMullen v. INS*, 788 F.2d at 593. Rather than presenting evidence that the IRA is a paramilitary organization whose activities are directed against military targets, not civilians (precisely the kind of evidence Doherty presented at his extradition hearing and would present at a hearing on his eligibility for withholding of deportation to the United Kingdom), McMullen presented evidence documenting what he alleged to be the "terrorist activities" of the IRA. *Id.* The Attorney General's reliance on *McMullen* to deny Doherty a hearing was clearly erroneous.

27 The Attorney General's linkage of membership in an organization to alleged participation in an unlawful "conspiracy" is contrary to rulings of

The degree of proof necessary to disqualify a person for withholding also demonstrates the fallacy of the INS' contention that a premature determination of Doherty's ultimate disqualification for withholding is analogous to Doherty's obligation to present a *prima facie* case. Pet. Br. at 36. The requirement of a *prima facie* case is to decide *whether* an applicant will get a hearing. In contrast, a disqualification determination turns on the *results* of that hearing.

To establish a *prima facie* case an applicant need only "allege specific facts, which 'would, if proved, establish eligibility [for relief].' " *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (quoting *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (*en banc*), *rev'd on other grounds*, 450 U.S. 139 (1981)). In contrast the issues related to disqualification from withholding of deportation require much more than the presentation of a mere basis for denial. They involve a detailed balancing of the nature of any alleged non-political crime, motives of the applicant, and the degree of persecution feared, which can only be adequately resolved by a hearing. It borders on the Orwellian for the Attorney General to contend that he can deny Doherty's right to a hearing on the basis of a conclusion that can be reached only after a hearing has been conducted.

The crucial role that a hearing plays in determining whether an applicant is to be disqualified from withholding confirms this Court's admonition that the Attorney General

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the courts and the BIA on this issue. Refugees who have been members or active supporters of political movements which use violence to overthrow a government are consistently granted asylum and withholding of deportation. *See, e.g., Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985) (member of guerrilla group found eligible for asylum); *Matter of Rodriquez-Majano*, Int. Dec. No. 3088 (BIA Sept. 28, 1988) (individual who provided material support for guerrillas, including covering them with his weapon while they burned cars, found not to be disqualified from withholding of deportation); BIA Dec. at 3 (Heilman, J., concurring) (PA at 110a-11a) (referring to Board experience with cases involving nationals from India, Sri Lanka, Guatemala, Ghana, and El Salvador in which asylum was granted to individuals fearing government action against them because of actual or suspected involvement in guerrilla or terrorist activities).

may not "leap ahead" when the request for the underlying relief is withholding of deportation. *Abudu*, 485 U.S. at 105. In response, the INS offers only the cryptic language from this Court's decision in *Abudu* that there are "at least" three independent reasons for denying reopening. Whatever additional grounds may have been contemplated by this "at least" language, it does not encompass "leaping ahead" when the motion to reopen is for the purpose of applying for withholding since this Court expressly rejected that possibility. *Id.*

Indeed such "predetermining" of the merits of a withholding claim would eviscerate the fundamental protection that section 243(h) is designed to afford. As shown above, the grounds for denying withholding require an assessment of specific factors and a balancing of specified criteria. Neither is possible without a hearing. When a movant establishes a *prima facie* case, and demonstrates changed circumstances or a reasonable explanation for a delay, he or she is entitled to a full hearing on withholding of deportation. If the INS' position prevails, an alien who demonstrates a clear probability of persecution will be deported without ever being afforded a hearing and the opportunity to demonstrate his or her eligibility for the most fundamental protection against persecution.

III. UNITED STATES FOREIGN POLICY CONSIDERATIONS ARE NOT LEGITIMATE CONCERNS IN DETERMINING DOHERTY'S ULTIMATE ELIGIBILITY FOR ASYLUM.

A central purpose behind enactment of the Refugee Act of 1980 was the establishment of a fair and humanitarian framework for refugee protection which includes the removal of foreign policy considerations from decision-making and brings the United States into full compliance with its obligations under international law. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; *see* Brief of *Amicus Curiae* UNHCR and Brief of *Amici* Members of Congress; *see also* Lawyers Committee for Human Rights, *The Implementation*

of the Refugee Act of 1980: A Decade of Experience, (March 1990) [hereinafter LCHR Report]. The Refugee Act reformed asylum and withholding of deportation by removing ideological, political and geographical considerations. *See* Inzunza, *The Refugee Act of 1980: Ten Years After—Still the Way to Go*, 2 Int'l J. of Ref. L. 413, 417 (1990); LCHR Report, at 6.[28] We strongly endorse the arguments presented by *amici* UNHCR and Members of Congress that demonstrate that both the Refugee Act and the Convention were intended to remove foreign policy considerations from asylum decision-making. Moreover, since passage of the Refugee Act, both the INS and the courts have taken significant measures to halt discriminatory treatment of refugees on the basis of foreign policy. These additional measures further demonstrate that foreign policy considerations cannot provide a legitimate basis for a denial of asylum.

Final regulations recently were enacted in 1990 establishing procedures for obtaining asylum, based on "[a] fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process . . . ." 55 Fed. Reg. 30,675 (1990). The new regulations establish a range of measures that enhance the integrity of the asylum adjudication process, and indicate in a number of ways that United States' foreign policy considerations have no place in asylum determinations.

The new regulations remove the adjudication of asylum claims from the jurisdiction of INS District Directors and place them under the purview of Asylum Officers who are

28 The Deputy Commissioner of the INS has acknowledged that the most important change of the 1980 Refugee Act was the adoption of the international definition of "refugee" which removed the geographic and ideological restrictions of the previous definition. Inzunza, *supra*, at 417. As he pointed out:

> Implementation of the neutral refugee definition contained in the Refugee Act assumed adoption by the Immigration and Naturalization Service (INS) of an adjudication standard which was uniform worldwide, *equally applicable to all refugee and asylum applicants . . . regardless of provenance or ideology*. . . . The worldwide standard is currently an integral part of all INS refugee and asylum training.

Id. at 417-19 (emphasis added).

members of the INS Office of Refugees, Asylum and Parole. Pursuant to 8 C.F.R. § 208.1(b) (1991), these asylum officers are to be independently trained in international law and international affairs. Under 8 C.F.R. §§ 208.12-.13 (1991), they are authorized to rely on evidence about the conditions in countries of alleged persecution provided not just by the Department of State and the INS, but from a wide range of sources including international organizations and academic institutions. An asylum officer is expected to make an informed and independent decision regarding each application, based on all the relevant evidence. In addition, each asylum officer is now required to issue written decisions, detailing the basis for denials of relief and assessing the applicant's credibility in adverse decisions. *See* 8 C.F.R. § 208.17 (1991).

The new regulations also lay out explicit guidelines for the exercise of discretion on asylum applications. 8 C.F.R. §§ 208.14-.15 (1991). An Immigration Judge or Asylum Officer shall deny asylum in the exercise of discretion on one of three grounds: (1) the applicant has been convicted of a particularly serious crime in the United States, (2) the applicant has been firmly resettled within the meaning of 8 C.F.R. § 208.15, or (3) there are reasonable grounds for regarding the applicant as a danger to the security of the United States. *See* 8 C.F.R. § 208.14 (1991). However, if an asylum applicant's claim is denied on one of these three grounds, the applicant still must be given the opportunity to demonstrate, by a preponderance of the evidence, that such grounds do not apply. 8 C.F.R. § 208.14(b). There is no mention of foreign policy considerations as being one of the grounds for mandatory denial.

The INS also acted to sever the processing of asylum claims from foreign policy concerns by its resolution of long-standing complaints about the unfair denial of asylum to Salvadorans and Guatemalans. In the *ABC* Settlement, *supra*

p. 3, at 799,[29] the INS explicitly stipulated that "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." *Id.*[30]

The INS' contention that the *ABC* Settlement is irrelevant to this case because, by its terms, it only precludes foreign policy considerations in the determination of whether an individual has a well-founded fear of persecution, misses the point. *See* Reply Brief for the Petitioner On Application for a Writ of Certiorari at 3-4. Foreign policy considerations have been removed from determinations of eligibility for asylum in order to make the remedy of asylum available on a humanitarian rather than a political basis. Were the INS able to reintroduce foreign policy considerations through the exercise of discretion, the reason for removing such considerations from determinations of eligibility would be defeated and the purposes of the asylum remedy would be frustrated. The Attorney General's zeal to return Doherty to the United Kingdom cannot be permitted to unravel the non-political framework of refugee protection which is the essence of the Refugee Act.

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29 This settlement was the culmination of litigation alleging long-standing patterns of discrimination against Salvadoran and Guatemalan refugees seeking asylum in the United States. These refugees, who clearly met the requirements for obtaining asylum, were systematically denied protection because, for foreign policy reasons, the government was reluctant to be perceived as critical of the Salvadoran and Guatemalan governments. *See ABC v. Thornburgh*, Third Amended Compl., Civ. No. C-85-3255 (RFP); *see also* Carrillo, *The Application of Refugee Laws to Central Americans in the United States*, IX B.C. Third World L.J. 1 (1989); LCHR Report, *supra* p. 26, at 67-70.

30 The INS further stipulated that "whether or not the United States Government agrees with the political or ideological beliefs of the individual" is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution. *See ABC v. Thornburgh*, Third Amended Compl., Cir. No. C-85-3255 (RFP).

CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge this Court to affirm the decision of the Court of Appeals below.

Dated: June 5, 1991

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BRIEF OF AMNESTY INTERNATIONAL AND AMNESTY INTERNATIONAL-USA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS

This brief is submitted amicus curiae by Amnesty International ("AI") and Amnesty International-USA ("AIUSA"), with the consent of the parties.

AIUSA is one of the 44 national sections of AI, an independent worldwide movement which works impartially to seek the release of "prisoners of conscience," defined as men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language, or religious creed, provided they have not used or advocated the use of violence. AI also works for for fair and prompt trials for all political prisoners, and opposes torture or other cruel, inhuman or degrading treatment or punishment.

AI was founded in London in 1961 and now has more than 1,000,000 individual members, subscribers, and supporters in 150 countries. There are more than 4,200 AI groups in more than 70 countries, working in support of all aspects of AI's mandate. Since AI was founded, AI groups

have intervened on behalf of over 25,000 prisoners in more than 100 countries.

Basing its mandate on the Universal Declaration of Human Rights, GA Res. 217A, U.N. Doc. A/810 (1948), and other international standards for the protection of human rights, AI operates independently of any government, political grouping, ideology, economic interest or religious creed and does not therefore support or oppose the views of any person whose rights it seeks to protect. Nor does AI grade governments according to their record on human rights. Rather than attempting such comparisons, AI concentrates on trying to end specific human rights abuses within its mandate and advocates that all governments comply with international standards to protect human rights. For its work, AI received the Nobel Peace Prize in 1977.

On the basis of missions, interviews and a worldwide network of correspondents, AI's International Secretariat in London collects information and issues reports on human rights conditions throughout the world, including the United Kingdom. AI has also issued reports with respect to refugee protection -- including procedures for the determination of refugee status -- in a number of countries, including the United States. This information is disseminated to governments and the public in reports, interventions, and various other materials.[1]

AI's concern for refugees arises from its work for the protection of human rights, which includes opposition to the forcible return of any person to a country

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[1] AI has formal consultative status or similar formal relations with the United Nations ('U.N."), UNESCO, the Organization of American States, the Council of Europe, and the Organization of African Unity.

where he or she risk a threat to his or her life or freedom, because refugees who are so returned are or may become "prisoners of conscience." AI therefore seeks to ensure that governments observe the principle of <u>non-refoulement</u> -- expressed in the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), as incorporated by the U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S.268 ("Protocol")[2] -- and that all refugees

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[2] Although the United States is not a signatory to the Convention, since 1968 it has been a party to the Protocol, which incorporates Articles 2 through 34 of the Convention. The United States thereby agreed to be bound by all the obligations under the Convention. Accordingly, for the purposes of this brief, references to the Protocol and U.S. obligations under it will include the Convention and its provisions. Unless otherwise specified, references to "Articles" will be to Articles in the Convention, as incorporated by the Protocol.

have access to a fair and adequate refugee determination procedure. Accordingly, AI participated in the legislative process which led to the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. (the "Refugee Act" or "Act"), and regularly provides information about country conditions and international legal standards to courts, administrative agencies, and decision-makers at all levels of the refugee process, including through the submission of amicus curiae briefs to this Court. See, e.g., INS v. Stevic, 467 U.S. 407 (1984); Jean v. Nelson, 472 U.S. 846 (1985).[3]

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[3] Although AI is often unable to express an opinion about the validity of a particular applicant's fear of persecution, the Immigration and Naturalization Service ("INS") and the courts have relied upon AI's expertise in assessing the human rights situation in various nations around the world for the purpose of evaluating an individual's request for asylum in this country. See, e.g., Fernandez-Roque v. Smith, 539 F. (continued...)

AI is specifically interested in this case because it raises an issue of due process for those who seek to exercise their right to non-refoulement under the Convention and Protocol that has dire implications for all refugees. AI's interest in this case is unrelated to the factual basis of Doherty's applications, but AI strongly holds the position that under international standards refugees are entitled to hearing on the merits of their non-refoulement claims by the established authority through a fair and adequate procedure, and that reliance on foreign policy considerations in denying such a hearing is inappropriate. It is AI's view that a dangerous precedent would

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[3](...continued)
Supp. 925 (N.D. Ga. 1982); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977). The United States Congress has also recognized the integrity of AI's human rights information. See, e.g., International Financial Institutions Act of 1977, 22 U.S.C. § 262g.

be set if the executive branch of government were allowed, on the grounds of foreign policy considerations, to deny refugees a hearing on the merits of their non-refoulement claims. To grant such an executive veto would be wholly contrary to the protective purpose of international standards regarding refugee determination procedures and would put thousands of refugees seeking protection in the United States at risk of persecution.

SUMMARY OF ARGUMENT

AI and AIUSA respectfully urge this Court to affirm the Second Circuit's decision (1a-45a)[4] that the Refugee Act requires that a person seeking refuge from persecution in this country be afforded a hearing on those claims before being

[4] The opinion of the Court of Appeals is reported at 908 F.2d 1108 (2d Cir. 1990). "__a" refers to the Appendix to the Petition for Certiorari. "JA __" refers to the Joint Appendix.

subjected to deportation and that the statute prohibits the use of foreign policy consideration to deny such a hearing. The Court of Appeals decision is entirely consistent with, and indeed compelled by, this country's international obligations under the Protocol.

The Government claims that it may determine that Doherty is deportable, without a hearing, on the sole basis of the cold transcript of prior extradition proceedings in which the District Court found that the "political offense" exception to the Extradition Treaty between the United States and the United Kingdom barred Doherty's extradition.[5] G.

[5] See In re Doherty, 599 F.Supp. 270, 272 (S.D.N.Y. 1984); Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, art. V(1)(c)(i), 28 U.S.T. 230, T.I.A.S. No. 8468. On the face of this record, factual disputes remain in Doherty's case, including the question whether the United Kingdom recognized and separated members of the Provisional Irish

(continued...)

Brief, 35-36. Whatever the ultimate merits of Doherty's claims for asylum and withholding of deportation, the provisions and entire structure of the Protocol and the international system of protection of refugees based upon the Protocol's mandate that the claims of persons claiming to be refugees must be evaluated in the context of fair procedures.

Though the Protocol does not prescribe the precise contours of such proceedings, clearly the Government's claim that this decision may be made on the bare record of a prior extradition proceeding, without providing Doherty any opportunity to present evidence or to be heard on his claim for protection as a refugee, is manifestly inconsistent with the core principles of the Protocol and of

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[5](...continued)
Republican Army ("PIRA") as "political" prisoners. See JA 145-46.

the Refugee Act which Congress enacted to implement these international standards. The Protocol mandates that governments provide for the humane and nondiscriminatory treatment of "refugees" (i.e., any person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to return to his country of nationality or of his former habitual residence), Protocol Article I(2), and for certain rights and privileges to those who are "refugees." See, e.g., Articles 4, 15, 17 and 20-24 (requiring at least the same treatment for refugees as for nationals, with respect to freedom of religion, rights of association, employment and welfare, respectively).

Furthermore, the Protocol's explicit requirements to consider each particular

element for refugee determination, as well as its implicit requirement of fair and adequate procedures, direct that the United States may not, in the absence of a hearing, make the type of conclusions at issue in Doherty's case -- i.e., whether Doherty meets the definition of "refugee" so as to entitle him to protection (8 U.S.C. § 1101(a)(42); Article 1A(2)), whether he cannot be returned to the United Kingdom because his "life or freedom would be threatened" (8 U.S.C. § 1253(h)(1), Article 33.1) or whether he may be excluded from protection on the grounds that he has committed "serious non-political crimes" (8 U.S.C. § 1253(h)(2)(C); Article 1F(b)), or has "participated in the persecution of others on account of their political beliefs." (8 U.S.C. § 1101(a)(42); 1253(h)(2)(A)).

In denying Doherty's motion to reopen deportation proceedings on the ground that

he was not entitled to the relief of withholding of deportation and asylum, 46a-91a, the Attorney General purportedly resolved all legal and factual issues relating to Doherty's claim for protection as a refugee without any hearing on the merits to afford Doherty the opportunity to present evidence and argument as to the many factors relevant to a determination of refugee status. In reversing the Board of Immigration Appeals ("BIA") on Doherty's reopening claim, the Attorney General has also ignored the criteria prescribed by the Protocol. The Government recognizes these criteria as relevant (G. Brief, 41-45), but its post hoc recitation of the criteria is insufficient to comply with the requirements of the Act and Protocol.

The Government also expressly relies on the United States' foreign policy interests as grounds for denying Doherty's

application for a hearing. Nothing in the text or legislative history of the Refugee Act indicates that such factors are an appropriate basis for denying the refugee protections at issue in this case. Moreover, consideration of these factors is contrary to the clear purposes of the Act and the international legal principles of non-refoulement and non-discrimination, as expressed in Articles 33.1 and 3 of the Convention.

In reversing the Attorney General's decision, the Second Circuit noted first that the mandatory nature of the withholding remedy itself suggested the impropriety of determining entitlement to relief in the context of a motion to reopen (15a-17a); that the issues raised by Doherty's application presented "formidable questions of fact" (relating to his fear of persecution, the nature of the crimes for which he was convicted by a

British court, and the government's allegations that he had been involved in the persecution of others) that could not adequately be resolved without an evidentiary record (17a); and that, further, foreign policy interests could not serve as the basis for determining entitlement to these protections. 18a-27a. In construing the Act to require "examination of a fully developed record" as the "necessary precursor to the fair resolution of Doherty's claim, by an immigration judge, by the Board, and, if it comes to it, by this Court in another appeal," 17a (citations omitted), and in prohibiting consideration of U.S. foreign policy 18a-27a, the Second Circuit acted in accordance with the principles of minimal fairness required of the United States under the Protocol.

ARGUMENT

I. INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION OF REFUGEES REQUIRE THAT DOHERTY BE GIVEN A HEARING ON HIS APPLICATION FOR REFUGEE STATUS AND THE PROTECTION OF NON-REFOULEMENT

A. International Legal Standards Are Particularly Relevant To The Determination Of This Case

As international law is the law of the land under the United States Constitution, international legal standards for the protection of refugees expressed in treaties or in customary norms are relevant to the question whether the Attorney General may exercise his statutory discretion over motions to reopen deportation proceedings to determine the merits of Doherty's claim for protection as a refugee on the basis of a record developed in prior extradition proceedings and in the absence of any hearing specifically dedicated to the determination of Doherty's refugee status.

The consideration of international law standards is required in this case for several reasons. First, through the United States accession to the Protocol, the United States is bound by its obligations as a "Treat[y] made ... under the Authority of the United States," the provisions of which are the "supreme law of the land." U.S. Const., Art. VI § 2. Like all treaties, the Protocol therefore qualifies in some measure the sovereignty of the United States. See The F.S. Wimbledon (1923) P.C.I.J., ser. A, No. 1, 24, 25. The United States treaty obligations under the Convention require the government to comply with the non-refoulement requirement of Article 33.1. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1986). The non-refoulement requirement of Article 33.1 must be given effect by the courts because it is self-executing. Cardoza-Fonseca, 480 U.S. at

429 ("Article 33.1 imposes a mandatory duty on contracting States")(emphasis added); See also, Coriolan, 559 F.2d at 996-997; Nicosia v. Wall, 442 F.2d 1005, 1006 n. 4 (5th Cir. 1971).

Second, international law has long been accepted as a principal referent in the interpretation of statutory and constitutional provisions, Fong Yue Ting v. United States, 149 U.S. 698 (1893) (international legal principles inform congress' power of exclusion and deportation of aliens), and must be applied by United States courts. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796).[6]

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[6] See also Restatement (Second), §§ 102, 135; Comment j (customary international law has the same force and effect as treaties and international agreements, and thus like federal statutes is the "law of the land."); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982) ("in an appropriate case, to ascertain what Congress has authorized, one must consider the treaties, agreements, and customary international (continued...)

Thus, federal statutes "ought never to be construed to violate the law of nations, if any other possible construction remains." Weinberger v. Rossi, 456 U.S. 25, 32 (1982), quoting Murray v. The Schooner Charming Betsey, 6 U.S. (2 Cranch) 64 (1804). This axiom is particularly compelling with regard to the Refugee Act in light of the Congressional intent to conform United States immigration law to the requirements of the Protocol.

In its landmark decision in Cardoza-Fonseca, this Court found support in the history and the plain language of the Refugee Act that international law for the protection of refugees both inspired the Act and continues to play an important

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[6](...continued) law to which the United States subscribes, as well as to domestic law."); Accord Bowater S.S. v. Patterson, 303 F.2d 369 (2d Cir.), cert. denied, 371 U.S. 860 (1962).

role in its interpretation. 480 U.S. at 436-437 ("If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.").[7]

In particular, the Refugee Act adopts the Convention's definition of "refugee," as well as its scheme of classifications and grants of protection for asylum and withholding of deportation, including the

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[7] See also, Stevic, 467 U.S. at 426-427 (Act adopted and expanded Protocol's definition of refugee and was intended to be construed in a manner consistent with it); S. Exec. Rep. No. 96-256, 96th Cong., 1st Sess. 1979, (the new statute was to be evidence of "our national commitment to human rights and humanitarian concerns" which had not been reflected in the previous immigration Acts).

provisions of Article 33.1. Id., at 424, discussing Stevic.[8]

The Handbook on Procedures and Criteria For Determining Refugee Status, (Geneva 1979)(the "Handbook") was also found by this Court to be a reliable source for interpreting the Act. Cardoza-Fonseca, 480 U.S. at n. 22 (while not binding, the Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform."). The Handbook evolved from an request of the Executive Committee of the U.N. High Commissioner for Refugees ("UNHCR") -- on which the United States sits -- that the Office of the UNHCR

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[8] Thus, Congress stated that it sought "to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and [felt] it both necessary and desirable that United States domestic law include the asylum provision in the instant legislation." Stevic, 467 U.S. at n. 20.

publish a handbook for the guidance of governments as to their obligations under the Protocol. Exec. Com. Concl. No. 8(XXVIII).[9]

It is incontrovertible that the Act is to be interpreted in light of the international law obligations relating to the protection of refugees[10], and that actions of the United States, including those undertaken by the Attorney General within the discretion conferred to him by the Act or regulations, must be consistent

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[9] Article II(1) of the Protocol, like Article 35 of the Convention, places an obligation on States Parties to "co-operate" with the UNHCR and "facilitate its duty of supervising the application of the provisions of the present Protocol." Such cooperation and facilitation requires, at a minimum, that States Parties observe authoritative conclusions of the Executive Committee of the UNHCR and follow the guidelines and interpretations of the Handbook.

[10] The Government appears to concede this point. G. Brief, 24-25, 41 n. 23, 43.

with this country's international legal obligations.

B. <u>International Standards Require That Doherty Be Given A Hearing On The Merits Of His Claims</u>

In denying Doherty's motion to reopen deportation proceedings on the ground that he was entitled to neither the mandatory relief of withholding of deportation under § 243(h) of the Refugee Act (because there were "serious reasons for considering that [Doherty] has committed a serious non-political crime outside of the United States," § 243(h)(2)(C), and because Doherty "assisted or otherwise participated in the persecution of ... person[s] on account of ... political opinion." § 243(h)(2)(A)), nor to the relief of asylum under § 208 because of foreign policy concerns, the Attorney General rendered an administrative decision that purportedly resolved all legal and factual issues

relevant to Doherty's claim without a hearing on the merits.

Since the right of refugees to non-refoulement protection is assured both by the Refugee Act and the Protocol, the question whether the Attorney General's exercise of discretion is contrary to law cannot be determined without reference to this country's international obligations under the Protocol. Under international law the merits of a claim for protection as a refugee may not be determined in the absence of fact-finding procedures adequate to protect this fundamental right. Thus, the Court of Appeals' conclusion that the Attorney General had no authority to determine Doherty's eligibility for the mandatory relief of withholding of deportation under § 243(h) without a hearing on the merits, (15a-17a) is consistent with the United States'

binding obligations under the Protocol, and should therefore be affirmed.

As a party to the Protocol[11], the

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[11] 107 States have ratified the Convention or the Protocol, thereby accepting the expression in Article 33.1 of the customary international norm of non-refoulement which has evolved into a principle proscribing both the expulsion of refugees back to the country of origin and the rejection of refugees at a country's borders. While Article 33.1 does not permit States Parties to place any reservations upon it, its scope has been delineated by allowing "international security" and "public order" as potential grounds for nonacceptance; however, these exceptions do not put into question the universal applicability of the principle. G. Goodwin-Gill, "The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees," Transnational Legal Problems of Refugees, (1982) Michigan Yearbook of International Legal Studies 291, at 304 (reviewing State practice in Australia, Belgium, France, the Federal Republic of Germany, the United Kingdom, and the United States). As such, Article 33.1 is a norm-creating provision, of the type recognized by the International Court of Justice. North Sea Continental Shelf Cases, [1969] I.C.J. 3, 42. The widespread recognition of the binding nature of non-refoulement is further born out by its inclusion in other international agreements (See, e.g.,

(continued...)

United States is bound by the obligation of non-refoulement of Article 33.1 which states, in pertinent part, that:

> (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

This Court has found that Article 33.1 is the "counterpart" of § 243(h) of the Refugee Act, and that both prohibit refoulement and impose a mandatory duty not to return an alien to a country where his life or freedom would be threatened on account of one of the enumerated reasons. Cardoza-Fonseca, 480 U.S. at 429, 441.

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[11](...continued)
Article 3(1) Declaration on Territorial Asylum, (Dec. 14, 1967) A/RES/2312(XXII)), and its crystallization (since the end of World War II) into a customary international norm, so that its peremptory nature is now undisputed. G. Goodwin-Gill, supra, at 297-98.

This interpretation is consistent with the express legislative intent that § 243(h) is "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, at 20.

Further, the Act's specification of particular procedures for the benefit of those seeking protection as refugees, was intended to ensure the substantive protections of the Protocol. Stevic, 467 U.S. at 416-421. Thus, in exercising his statutory discretion under the Refugee Act, the Attorney General must act in conformity with both the substantive requirements of the Protocol and the minimal standards of procedural fairness necessary to ensure the right it guarantees.

Neither the Convention nor the Protocol describe any specific procedures

for determining claims for refugee status and non-refoulement protection. However, since the purpose and intent of the Protocol is the protection of refugees[12], particularly through signatories'adherence to the non-reservable obligation of non-refoulement, it is axiomatic that the beneficiaries of protection -- the refugee(s) defined in Article 1 of the Convention -- must initially be identified.[13]

Consequently, a refusal or failure to undertake the task of identifying refugees through the establishment of a procedure

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[12] Parties to the Convention have, in its Preamble, recognized "the social and humanitarian nature of the problem of refugees" and "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to asure refugees the widest possible exercise of [fundamental human rights]."

[13] The Handbook notes that "it is obvious that to enable States Parties to implement the provisions, refugees have to be identified." ¶ 189.

to determine refugee status constitutes a failure to implement the Convention and therefore the Protocol in good faith. Article 31(1) of the Vienna Convention in the Law of Treaties[14] strongly supports this conclusion. "Good faith" implementation of treaty provisions means that states are obliged to give effective implementation to treaty norms. A procedure to determine refugee status is simply the only means of applying Article 1 (especially the complex cessation and exclusion clauses), and of according to refugees the rights owed to them under the Convention and Protocol.

Effective implementation of the treaty norms also necessarily requires that the determination procedure be fair

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[14] U.N. Doc. A./Conf. 39/27 (1969). Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

and adequate in terms of being able to impartially and effectively identify those entitled to protection. The Handbook describes certain procedures adequate to meet the basic requirements. Proceeding from the principle that an individual enjoys presumptive refugee status prior to a formal determination on the merits of his or her claim for protection[15], the

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[15] Handbook, ¶ 28. (A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition.... He does not become a refugee because of recognition, but is recognized because he is a refugee) Accord See Vigile v. Sava, 535 F. Supp. 1002, 1014 (S.D.N.Y.) ("'Refugee' is a self-imposed label, not one requiring the imprimatur of the INS."), rev'd on other grounds, 684 F.2d 204 (2d Cir. 1982).

For this reason, aliens with a prima facie claim to refugees status are entitled to be treated with at least minimal fairness at the moment they present themselves for entry (i.e., before formal designation as a refugee), and to the protection of non-refoulement until they are conclusively determined not to be refugees. Report of the Arusha

(continued...)

Handbook notes that the determination of actual refugee status is a two-stage process, first to ascertain the relevant facts of the case, and second, to apply the legal definitions of the Convention and Protocol to those facts. Handbook ¶ 28, 29.

The Handbook's guidelines for methods of establishing the facts of an individual case illustrate the complexity of the fact-finding process and the need for procedures and personnel sensitive to the particular situation and vulnerability of the applicant. See Handbook ¶¶ 195-205. The Handbook also sets out guidelines for

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[15](...continued) Conference, Recommendation on the term "Refugee and Determination of Refugee Status, Executive Committee of the High Commissioner's Programme (30th Session) U.N. Doc. A/AC. 96/INF. 158, at 9. Such presumptive application of non-refoulement is common practice of States which have acceded to the Protocol and/or the Convention, generally under the rationale that it best ensures the right for genuine refugees. See Goodwin-Gill.

the interpretation of terms relevant to the determination of an applicant's claim of a well founded fear of persecution (See Handbook, ¶¶ 37-50, relating to the general analysis of the term, ¶¶ 51-53, ¶¶ 56-60, ¶65, relating to the term persecution, ¶¶ 66-86 relating to the enumerated grounds of race, religion, nationality, membership in a social group, political opinion).

These recommendations reflect the UNHCR's concern that in determining the facts of an individual's case, the criteria should be applied "in a spirit of justice and understanding" and should not be affected by any personal consideration that the applicant may be an '"undeserving case"' (Handbook para. 202). Thus,

> [t]he Examiner should: (i) Ensure that the applicant presents his case as fully as possible and with all available evidence. (ii) Assess and evaluate the applicant's credibility and evaluate the evidence . . . in order to establish the objective and subjective elements of the case. (iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.

Handbook, ¶ 205(b) (emphasis added).[16] The Handbook therefore makes clear that the initial determination in any application must relate to the particular facts giving rise to an application for protection as a refugee, and that only after the facts are established in accordance with procedures adequate to elicit all relevant evidence and to permit decisions as to the applicant's

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[16] In fact, the obligation to hear an applicant's claim on the merits extends from the Handbook provision that "it is for the examiner to ascertain reasons for fear of persecution." ¶ 67. Moreover, the circumstances experienced by an applicant for refugee status require that he be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular needs and difficulties. ¶ 190.

credibility, does the inquiry move to the application of the Protocol's legal standards.

Additionally, international law implicitly requires that asylum and deportation determinations be made by means of a hearing on the merits. For example, the Handbook requirements that "each applicant must show good reasons why he individually fears persecution" (¶ 45)(emphasis added), and that he "establish, to a reasonable degree" that he could not stay in or return to his country of origin (¶ 42)(emphasis added), imply that an applicant be given an opportunity to present evidence on his behalf.

Similarly, the UNHCR Executive Committee has recommended that an applicant should be given the "necessary facilities" for submitting his claim. Exec.Com. Concl. No. 8(XXVIII)(iv), quoted

at Handbook, ¶ 192.[17] Although the Conclusion lists an interpreter and access to the UNHCR as some examples of what constitutes "necessary facilities," these requirements could have no significance -- especially in light of the Handbook guidelines mandated by international law -- in the absence of otherwise adequate procedures, including a hearing on the merits of the claim for refugee status and protection.[18]

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[17] Executive Committee Conclusion No. 8(XXVIII) (1977) established "basic requirements" for State procedures for determining refugee status which were aimed at ensuring that "the applicant is provided with certain essential guarantees." Handbook, ¶ 192. Included within these are recommendations that the "competent official" who makes refugee determinations "should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments" and should be required to act in accordance with the principle of non-refoulement. Id. 5.

[18] Moreover, this conclusion is supported by the entire framework of the

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The Convention's definition of "refugee," and the Handbook's analysis is consistent with this Courts own examination of the definition of "refugee." Cardoza-Fonseca, 480 U.S. at 439-440. Under the Refugee Act, an applicant for refugee status must prove that he or she is a "refugee" by presenting proof of a well founded fear of persecution, and must demonstrate that his "life or freedom would be threatened." 8 U.S.C. §§ 1101(a)(42), 1253(h)(1). This Court has also recognized that the ambiguous nature of the term "well founded

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[18](...continued)
Refugee Act. There is no evidence that Congress intended for determinations regarding withholding of deportation to be made without establishing an evidentiary basis. Indeed, the Act and regulations set forth procedures for fair process of refugee claims in the form of hearings for exclusions, deportations, and affirmative actions by district directors. This is so even in the conext of a motion to reopen, because withholding is a mandatory remedy. See INS v. Abudu, 485 U.S. 94 (1988).

fear," as adopted into the Act from the Convention,[19] requires the examination of both the subjective feelings of the applicant[20] for asylum and the objective

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[19] Although [the withholding of deportation] section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention. ... As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements. Stevic, at n. 20, H. Rep. at 17-18 (House Judiciary Committee Report).

[20] The Convention's definition significantly altered the previous method of defining refugee status by adding the subjective element of fear. (Handbook ¶¶ 37-38) which "is inseparable from an assessment of the personality of the applicant" (Handbook, ¶ 40) and of opinions and feelings of the applicant. Handbook, ¶ 52. The "determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin." Handbook, ¶¶ 37, 42.

(continued...)

reasons for the applicant's fear[21], and that this "can only be given meaning through a process of case-by case adjudication." Cardoza-Fonseca, 480 U.S. at 430-431, 448; Accord Handbook, ¶ 43 (each individual's situation must be assessed on its own merits). The need for an evidentiary hearing in refugee determinations is, therefore, bolstered by

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[20](...continued)
Thus, it is "necessary to take into account ... everything that may serve to indicate that the predominant motive for his application is fear." Handbook, ¶ 41. Moreover, "[d]ue to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not clear from the facts on the record." Handbook, ¶ 41.

[21] The Convention's definition of refugee includes the objective element that an applicant's fear be "well founded." Handbook ¶ 38. In establishing well-foundedness, "it is necessary to evaluate the statements made by the applicant." Handbook ¶ 42. However, the Handbook provides, in ¶ 42, testimony of the applicant "cannot ... be considered in the abstract, and must be viewed in the context of the relevant background situation.

the fact that the "key phrase" of the definition of refugee (i.e., "well founded fear of being persecuted") requires the appraisal of both subjective and objective factors. Handbook, ¶¶ 37-50; See also Alvarez-Flores, 909 F.2d 1, 5 (1st Cir. 1990).

Some factual, evidentiary inquiry is necessarily required to establish these factors and to form the basis for making the required legal determination. Several appellate courts have acknowledged that the standards require that the applicant make a showing "by credible, direct, and specific evidence." Alvarez-Flores, 909 F.2d at 5, quoting Diaz-Escobar, 782 F.2d 1488, 1492 (9th Cir. 1986).[22]

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[22] See also M.A. v. INS, 899 F.2d 304, 311 (4th Cir 1990 (en banc) ("To validate the 'well-foundedness' of his fear, [petitioner] must set forth specific, concrete facts"); Cruz-Lopez v. INS, 802 F.2d 1518, 1522 (4th Cir. 1986) ("specific facts" required for objective evaluation).

The Handbook's guidelines for the determination of refugee status support the Court of Appeals conclusion that it was an abuse of discretion for the Attorney General to deny Doherty's motion to reopen by determining without a full evidentiary record that he would not be entitled to non-refoulement protection as incorporated in § 243(h).

The Attorney General denied Doherty's motion to reopen on the grounds that he was ineligible for withholding of deportation because under the statutory exceptions to the otherwise mandatory remedy, there are "serious reasons for considering that [Doherty] has committed a serious non-political crime outside of the United States" § 243(h)(2)(C) and that Doherty "assisted or otherwise participated in the persecution of ... person[s] on account of ... political opinion § 243(h)(2)(A). 81a-91a.

This determination constitutes a decision on the merits of Doherty's claim. Thus, the procedures by which the "finding" is made that Doherty is not entitled to "refugee" status must comport with the international standards of both the Protocol and the Refugee Act. Under Article 1F(b) of the Convention, a person with regard to whom these are "serious reasons for considering" that he has "committed a serious non-political crime outside the country of refuge prior to his admission as a refugee" may be excluded from refugee status, even though otherwise demonstrating the characteristics of a refugee. While the statutory exceptions may "mirror" the exclusion clauses of Article 1F, the international standards require the same kind of scrupulous fact-finding with regard to the application of the exclusion clauses as applies to the

initial determination of eligibility for refugee protection.[23]

Additionally, the Handbook recommends a restrictive interpretation of the exclusion clauses. Because § 243(h) reflects the Protocol, and Congress expressly intended that it should be construed consistently with the Protocol, it is particularly appropriate for this Court to review the Attorney General's determination in light of the Handbook's guidelines concerning application of the exclusion clauses.

The Attorney General contends that the record of the extradition proceedings in

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[23] The Handbook's recommendations for fact-finding procedures take account of problems of proof that typically face a refugee because inherent in his situation is that, despite effort on his part, "there may still be a lack of evidence" and often he will not be "able to support his statements by documentary or other proof." Handbook, ¶¶ 196, 203. Thus, the Handbook notes that "it is ... frequently necessary to give the applicant the benefit of the doubt." Handbook, ¶ 203.

which the government sought unsuccessfully to extradite Doherty to the United Kingdom under the extradition treaty in effect between the two countries established a reasonable basis for concluding that Doherty was ineligible for protection under the statutory exclusions of § 243(h). 88a-90a; G. Brief, 35-36. The Attorney General's contention is wrong, however, in light of the standards of procedural fairness essential to effect the Protocol's mandate.

The Handbook requires several considerations for the application of Article 1F(b), including whether the applicant had committed a "crime,"[24] whether the crime was "serious," and whether that the crime is "non-political." Handbook, ¶¶ 152, 155. Determining the

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[24] All relevant factors regarding the crime, including mitigating and aggravating circumstances should be considered. Handbook, ¶ 157.

political nature of a crime depends upon: (1) the "nature and purpose" of the act "i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain," (2) whether a "close and direct causal link between the crime committed and its alleged political purpose and object," and (3) whether the political element of the offence also outweighs its common-law character (i.e. whether the acts committed are proportionate to the alleged objective). Handbook, ¶ 152.

The Contracting State in whose territory the applicant seeks recognition of his refugee status must apply these exclusion clauses. Handbook, ¶ 149. As a general principle, the facts leading to an individual's exclusion will emerge during the process of determining that person's refugee status, i.e., during a fact-finding process sufficient to protect the

right of non-refoulement in a fair and non-discriminatory fashion.[25] Particularly with regard to exclusion of persons not considered deserving of international protection under Article 1F, the Handbook cautions that while governments must decide whether any of the exclusion clauses are applicable to an individual seeking refuge in their territories, "the interpretation of these clauses must be restrictive" because of the "serious consequences of exclusion for the person concerned." Handbook, ¶¶ 149, 180.

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[25] Paragraph 141 of the Handbook states:

> Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee.

Most importantly, "[i]n applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared." Handbook, ¶ 156.[26] Thus, an examination of the factors relevant to an assessment of the applicant's fear of persecution is necessarily required.[27]

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[26] See also, Handbook, ¶ 161 ("While there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear and the extent to which such fear is well-founded, will have to be duly considered in determining his possible refugee status under the 1951 Convention."). Accordingly, "[i]f a person has a well-founded fear of very severe persecution, ... a crime must be very grave in order to exclude him." Handbook, ¶ 156.

[27] That an "applicant must show that he has a fear of persecution for holding [political] opinions .... presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods." Handbook, ¶ 80. An applicant (continued...)

While the government recites the Handbook's criteria relating to the exclusion clauses and contends that the Attorney General's determination of Doherty's exclusion under § 243(h)(2)(C) is consistent with them, there can be no question that the Attorney General's determination was not based on the kind of

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[27] (...continued) must establish either a "causal link" between the opinion and the persecution or "the applicant's political opinion, which is at the root of his behavior, and the fact that it has led or may lead to the persecution that he claims to fear." Handbook, ¶ 81.

The Handbook permits political offenders to be refugees (¶ 84), and in such cases, "regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives. . . [and] the nature of the law on which the prosecution is based." Handbook, ¶ 86. The Handbook makes clear that "[t]hese elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment -- within the law -- for an act committed by him." Id.

fact-finding required under the Handbook guidelines to the Protocol. Thus, in concluding that Doherty's claim could not be decided on the merits without a hearing to develop a full evidentiary record, the Second Circuit gave effect to the substantive provisions of the Protocol and the minimal procedural protections necessary to protect its substantive rights.

The Attorney General's contention that Doherty was also ineligible for relief under the statutory exemption relating to persons who have persecuted others must be based on the same general principles and the same kind of detailed fact-finding that apply to the "serious crimes" exception. Since § 243(h) is to construed consistently with the Protocol, the statutory exceptions must conform to the Protocol's parameters for the

determination of eligibility for refuge status.

"Applications for refugee status are frequently made by persons who have used force or committed acts of violence." Handbook, ¶ 175.[28] As a basic principle, such applications "must in the first place -- like any other application -- be examined from the standpoint of the inclusion clauses in the 1951 Convention." Handbook, ¶ 176. Then, where it has been determined that an applicant fulfills the inclusion criteria, the question whether he is covered by one of the exclusion clauses may arise. Id.

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[28] Such use of force or acts of violence "may be associated with political activities or opinions, and which may have been committed within the framework of organized groups (either clandestine or political cum military organizations)." Handbook, ¶ 175. Similarly, political offenders may, in some cases, be refugees. Handbook, ¶ 84.

As the Second Circuit noted, and the Handbook confirms, Doherty's claim depends on the resolution of issues that raise "formidable questions of fact" and that a fair resolution of his claim cannot occur without the examination by an Immigration Judge, the BIA, and, if necessary, the federal courts, of a fully developed evidentiary record.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT FOREIGN POLICY CONCERNS ARE NOT A LEGITIMATE BASIS FOR THE DISCRETIONARY DENIAL OF ASYLUM UNDER SECTION 208(a) OF THE ACT

The Court of Appeals correctly found (1a-45a) that the Attorney General could not deny Doherty a hearing on his asylum claim on the grounds that the relief of asylum would be denied in light of unspecified "foreign policy interests" in the relationship between the United States and the United Kingdom, even if Doherty were otherwise eligible for refugee status.

Article 3[29] of the Convention specifically prohibits discrimination on the basis of country of origin. Discretionary denials of meritorious asylum claims on the basis of "foreign policy interests" necessarily result in such forbidden national origin discrimination.

Notably, the concurring decision of the BIA expressly found that Doherty was being discriminated against on the basis of his nationality. See 114a-115a. There is nothing in the legislative history or the language of § 208(a) of the Act that indicates that denials of asylum may be determined on the basis of the decision-maker's desire not to offend a particular

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[29] Article 3 states: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Accord Articles 1(3), 55(c), U.N. Charter, June 20, 1945, 59 Stat. 1031, T.S. No. 933.

persecuting government. Indeed, in adopting the Protocol standards into the Act, Congress was conscious of the goal to achieve equality of treatment for all refugees regardless of country of origin. S. Rep. No. 96-256, 96th Cong., 1st Sess. 2-3 (1979). This right not to be discriminated against is by nature a procedural right, a right to equal treatment before the law. Thus, this norm in the Protocol and Act sets forth a minimum standard of treatment in the process relating to refugees, especially when regarding the entitlement to asylum.

The Court of Appeals correctly found that Congress chose to make asylum a discretionary form of relief from deportation. 22a. However, the House Judiciary Committee specifically noted that it was concerned that the asylum system be "fair and workable" and "consistent with this country's tradition

of welcoming the oppressed of other nations and with our obligations under international law." H.R. Rep. No. 96-608, 96th Cong., 2nd Sess. 17-18 (1979), cited at 24a. Among those obligations under international law was the Protocol's prohibition on discrimination based on country of origin. Concerned that irrelevant factors might influence discretionary denials of asylum, the House Judiciary Committee indicated an intent to "monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect." Id. Such an intent to ensure that discretion was not misused is entirely inconsistent with the unfettered discretion for which the Government argues. G. Brief, 18-34.

As the Court of Appeals correctly notes, discretionary denial of asylum to a refugee out of a concern to cultivate

friendly relations with the persecuting government "would clearly violate the spirit, if not the letter, of the Refugee Act...." 25a. In adopting a politically neutral definition of refugees in § 101(a)(42)(A) of the Act and in indicating an intent to implement fully the obligations of the Protocol (which include the ban on country of origin discrimination), "congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum." 21a.

The Court of Appeals also correctly noted the types of discretionary factors that are legitimate in asylum denials to claimants who otherwise meet the refugee definition. 24a-25a. In a series of cases, the BIA has identified such factors as abuse of the asylum process by bypassing opportunities for overseas refugee admission under § 207 of the Act

and abandonment of a settled position in a safe third country.[30] See, e.g., Matter of Salim, 18 I & N Dec. 311 (BIA 1982); Matter of Pula, Interim Dec. No. 3033 (BIA 1987); Matter of Soleimani, Interim Dec. No. 3118 (BIA 1989). Even these factors, however, must be balanced against the asylum claimant's risk of persecution. Matter of Pula, supra.

It is crucial to note the breadth of discretion for which the Government is arguing in this case. While the Attorney General personally made the decision in respondent's case, most asylum decisions are made by Immigration Judges in the course of deportation or exclusion hearings, or by a newly hired corps of asylum officers, who have been delegated

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[30] Asylum regulations issued July 27, 1990, established mandatory denials for asylum-seekers who have been "firmly resettled within the meaning of § 208.15" of the regulations. 55 Fed. Reg. 30683 (July 27, 1990).

this authority by the Attorney General. 8 C.F.R. §§ 208.2(a) and (b); 55 Fed. Reg. 30680 (July 27, 1990). The Government argues that § 208(a) "should not be construed to impose substantive, judicially enforceable limitations on the Attorney General's discretion to deny asylum to a particular alien." G. Brief, 25. This means that any officer to whom the Attorney General's discretion has been delegated under § 208(a) could consider any undefined, subjective concerns for foreign policy, including a desire not to offend a "friendly" persecuting government, in denying asylum to a bona fide refugee.

Such denials for foreign policy reasons would inevitably result in the type of national origin discrimination against refugees that the United States pledged not to engage in when it ratified the 1967 Protocol and reaffirmed when the

Refugee Act of 1980 was passed. Therefore, as noted in Section I, the Refugee Act should not be construed to violate the treaty obligations of the United States if any other construction is possible, especially in light of the "primary purpose" behind the Act, including § 208(a), which was to bring United States refugee law into conformance with the Protocol. Cardoza-Fonseca, 480 U.S. at 436-37; Weinberger v. Rossi, 456 U.S. 25, 31 (1982).

The Government can point to nothing in the language or the legislative history of § 208(a) to support its assertion that foreign policy concerns were intended by Congress to be a legitimate basis for discretionary denials of asylum. Instead, the Government repeatedly and misleadingly cites passages from the legislative history of § 207 of the Act, which concerns the fundamentally different

process for overseas refugee admissions. See G. Brief, 20-21, 29-32. Significantly, §207 was not adopted to implement the United States' international obligations, since the Protocol and Convention concern only persons who are either in the territory of the asylum state or at the frontier. The creation of an overseas refugee admissions program was an entirely voluntary undertaking by the United States, not required by any obligation under international law and entirely separate from grants of asylum or conformance to the obligation of non-refoulement.

The overseas refugee admissions program created by § 207 is a designedly political process. Congress and the Executive engage in annual consultations that set the numbers of refugees to be admitted and allocate these admission numbers by geographical region. Other

factors are also inserted to identify overseas refugees of special concern to the United States, and the basic refugee definition has even been diluted in order to accommodate admissions of certain favored groups.[31] Perspectives on the foreign policy concerns of the United States obviously affect the joint decisions of the political branches in administering the overseas refugee admission program.

Significantly, these admission quotas and national-original-based criteria apply only to the overseas refugee admissions program under § 207 and not to asylum determinations under § 208(a). See

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[31] See, e.g., the Lautenberg Amendment, Pub.L.No. 101-167, § 599D, 103 Stat. 1195, 1261 (1989) (providing that certain Jewish and Evangelical Christian citizens of the Soviet Union could qualify for refugee status by demonstrating a "credible basis" for fearing persecution, rather than meeting the higher "well-founded fear" standard).

Aleinikoff and Martin, Immigration Process and Policy (Second Interim Edition, 1991) at 754. Respondent Doherty is simply not "applying for relief as a refugee outside the United States" who can be denied entry on the grounds of "foreign policy interests." G. Brief, 21 (emphasis in original). He is applying for asylum and withholding of deportation, having already entered the United States, under the fundamentally different provisions of §§ 208(a) and 243(h) of the Act. Because the overseas refugee admissions program of § 207 is essentially political in nature, it is not subject to any form of judicial review. In contrast, Congress subjected denials of asylum and withholding of deportation under §§ 208(a) and 243(h) not only to administrative review by the BIA, but also to judicial review in the federal courts, when made in the context of deportation hearings, under § 106(a) of

the Act. In the context of exclusion hearings, judicial review is also fully available by means of habeas corpus under § 106(b) of the Act.

Apparent patterns of national origin discrimination in the administration of the asylum system, allegedly fueled by the foreign policy concerns of asylum adjudicators, have been a matter of great controversy in recent years. See Amnesty International, Reasonable Fear: Human Rights and United States Refugee Policy (March 1990). In the recent settlement of a landmark case alleging national origin discrimination against asylum applicants from El Salvador and Guatemala, American Baptist Churches v. Thornburgh, Civ. No. C-85-3255 RFP (N.D. Cal. Dec. 19, 1990), the Government reportedly admitted that

> "foreign policy and border enforcement considerations, along with the fact that an asylum applicant is from a country whose government the United States

> supports, are not relevant to the determination of whether the applicant has a 'well-founded fear of persecution.'"

Interpreter Releases, Vol. 67, No. 48 at 1483 (December 21, 1990). In settling the case, the Government agreed to reopen approximately 150,000 denials of asylum. Id. at 1481. What would be the point in the government's undertaking this vast expenditure and effort, if Salvadorans and Guatemalans could validly be denied asylum in an exercise of discretion, because of the foreign policy concern that recognizing their meritorious claims of persecution would embarrass governments friendly to the United States?

CONCLUSION

For all of the foregoing reasons this Court should affirm the judgment of the Court of Appeals and this country's international obligations under the Protocol.

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Respectfully submitted,

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